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In The
Supreme Court of the United States

TOLLIS, INC., and 1560 N. MAGNOLIA AVE., LLC,

Petitioners,

v.

COUNTY OF SAN DIEGO,

Respondent.

On Petition For A Writ Of Certiorari To The Ninth Circuit United States Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Consistent with the First Amendment, may an unincorporated county adopt a zoning scheme that restricts the location of "adult" businesses only to industrial zones, where:

   a) Virtually all other forms of commercial activities are prohibited and so, as the county concedes, public access is less likely; and

   b) The purported justification for the exclusion of such uses from commercial zones, only advanced for the first time during litigation and without any evidentiary support, is to decrease "noise and traffic" – which are general attributes inherent in *all* commercial activities?

2. Under such a restrictive zoning scheme, who bears the burden of demonstrating "how speech will fare" under the "proportionality" test articulated by Justice Kennedy in his concurring opinion in *City of Los Angeles v. Alameda Books,* 535 U.S. 425 (2002), which has uniformly been recognized by the lower courts to be the constitutional "holding" of that plurality decision? In addition, and irrespective of where the burden lies, what evidentiary showing is required to satisfy that proportionality test?

3. Consistent with the First Amendment, when determining whether a zoning restriction allows sufficient "alternative avenues of communication" under *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), may a court presume that even if

QUESTIONS PRESENTED – Continued

there are too few potential sites within the subject jurisdiction, there are other areas suitable for adult businesses outside that area – thereby fostering a NIMBY ("Not In My Back Yard") approach to the zoning of adult businesses?

PARTIES TO THE PROCEEDINGS BELOW/PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES (PURSUANT TO SUPREME COURT RULES 14.1(B) AND 29.6)

The parties to the Ninth Circuit action below were: Tollis, Inc., 1560 N. Magnolia Ave., LLC, and Fantasyland Video, Inc. (Appellants); and the County of San Diego, California (Appellee).

Petitioner Tollis, Inc., states that its parent of the corporation is Imagination Corporation, a Michigan (non-public) corporation. There is no publicly held company owning 10% or more of the stock of Tollis, Inc.

Petitioner 1560 N. Magnolia Ave., LLC, has no parent corporation. There is no publicly held company owning 10% or more of the membership interest of 1560 N. Magnolia Ave., LLC.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Tollis, Inc., and 1560 N. Magnolia Ave., LLC, respectfully pray that a writ of certiorari be issued to review the ruling of the Ninth Circuit United States Court of Appeals entered in this proceeding on October 10, 2007.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported as *Tollis, Inc.*; *1560 N. Magnolia Ave., LLC v. County of San Diego*, 505 F.3d 935 (9th Cir. 2007). App. 1-17. The order of that court denying a petition for rehearing with suggestion for rehearing en banc is unreported, and is found at App. 165. The opinion of the district court granting in part and denying in part cross-motions for summary judgment is reported at 373 F.Supp.2d 1094 (S.D. Cal. 2005). App. 18-161. The order of the district court entering final judgment is unreported, and appears at App. 164.

JURISDICTION

The Ninth Circuit denied a timely filed petition for rehearing with suggestion for rehearing en banc by order filed January 3, 2008. This petition is filed within ninety days of that date. This Court therefore has jurisdiction to review the ruling of the Ninth Circuit pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The text of the First Amendment to the United States Constitution is found at App. 166, and the Fourteenth Amendment is reproduced at App. 166-168. San Diego County Ordinance No. 9469 (the amendatory zoning ordinance at issue in this petition) appears at App. 169-198. Previous versions of §§ 2980 and 6930 of the San Diego County Zoning Code ("SDCZC"), which apply to the zoning of "adult" uses, are found at App. 205 and 199-204, respectively. Provisions of the current SDCZC related to manufacturing zones are found at App. 206-230.

STATEMENT OF THE CASE

In early 2001, Tollis, Inc. ("Tollis") and 1560 N. Magnolia Ave., LLC ("Magnolia") developed a plan to open an adult entertainment establishment that offered live exotic performance dance entertainment and the sale of, among other things, sexually explicit expressive merchandise. Tollis was to own the the property and Magnolia was to operate the entertainment facility.

Tollis and Magnolia found a site in a C36 commercial zone located at 1560 North Magnolia Avenue (the "Premises") in unincorporated San Diego County (the "County") that was particularly suited to their plans and that appeared to meet all existing zoning requirements. Tollis submitted an offer to purchase

the Premises, contingent upon it qualifying for the establishment of an adult use under the County's zoning code. At the time, adult entertainment, as then-defined in the San Diego County Zoning Ordinance, was permitted in the C36, C37 and C40 commercial zones (see strikeouts in amendatory ordinance at App. 180-182), subject to the issuance of an Administrative Permit that would be granted only upon a finding that the proposed site met specified dispersal requirements.[1] App. 187-188.

Tollis applied for such a permit, which was issued by the County on August 9, 2001. With the sale contingency satisfied, the purchase was completed and Tollis then leased the Premises to Magnolia.

Magnolia then retained an architect to design the improvements necessary to operate the proposed business, and applied to the San Diego County Sheriff's Department for two types of licenses that would be required for the contemplated adult business (one for the retail portion, and the other for the live entertainment aspect of the facility). In early May of 2002, the Sheriff's Department issued both adult entertainment licenses to Magnolia.

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[1] These required an adult use to be located at least 500 feet away from a zone allowing a residential use as a matter of right; 600 feet from a church, school, public playground, park or recreational area; and 1000 feet from another adult use. App. 188.

Soon thereafter, Tollis and Magnolia learned that the San Diego County Board of Supervisors intended to respond to their anticipated project by amending the County zoning code so as to prohibit new adult businesses from locating in commercial zones, and by amending the County Code of Regulatory Ordinance to prohibit live nude entertainment. Faced with a delay by County officials in issuing building permits for the live entertainment portion of its facility and with the impending passage of the new zoning ordinance that would prohibit the establishment of *any* adult use on the Premises, Magnolia limited its improvements at the time to those necessary to immediately open and operate just a retail store (while leaving then the majority of the building vacant).[2] After the completion of the improvements, Magnolia opened the retail sales portion of its adult business.

On June 12, 2002, the County enacted Ordinance No. 9469, entitled "An Ordinance Amending the San Diego County Zoning Ordinance Relating to Adult Entertainment Establishments" (sometimes the "Ordinance," or "Ord. 9469"). App. 169-198. The preambles stated that the Ordinance was adopted based upon the purported concerns of "an increase in

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[2] This is how the Premises exist to this day.

crime and a decrease in property values" in the areas surrounding adult uses.[3] App. 170.

The Ordinance restricted new "adult" businesses[4] to four designated industrial zones,[5] and required existing adult uses to close, or to move from commercial zones to one of these specified industrial areas,

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[3] The prospect of criminal activity by individuals associated with adult uses, as well as the transmission of sexual diseases, were also listed as purported governmental interests. App. 170-174. However, the County later acknowledged that requiring the relocation of adult uses to industrial districts – which, as is discussed immediately below, was the primary requirement of the new Ordinance – would have no effect upon drug trafficking, prostitution, crime in adult businesses, or the transmission of sexual diseases. App. 241, 242, 245, 246, 248, 249 (responses to interrogatory No.'s 2, 3, 6, 7, 9-11).

[4] By enactment of Ord. 9469, the definition of what constituted an adult use also changed. For example, while an "Adult Bookstore" had been objectively defined as an establishment that devoted more than 15% of the total floor area for the display, rental or sale of adult materials (App. 231-232), the amendments at issue here modified that definition to substitute the subjective standard of a "significant or substantial portion" of its stock-in trade, revenues (undefined either in light of the type of revenues to be counted or the time period for measuring such revenues), interior business, advertising, section of sales or display space. App. 176. During the state court litigation discussed in n. 6, *infra*, which challenged the constitutionality of that definition (on, among others, vagueness grounds), the County once again modified the definition of an "Adult Bookstore" by the enactment of Ordinance No. 9827 so that "significant or substantial portion" now means 25% or more. App. 234.

[5] Because the County's zoning scheme uses the terms "industrial" and "manufacturing" interchangeably, so too will the Petitioners.

within three years. App. 192. In point of fact, Magnolia's store was the ***only*** adult business that would be forced to relocate under this revised zoning scheme that had been proposed only in direct response to the imminent opening of Magnolia's business.[6]

The manufacturing zones to which adult uses were relegated under the Ordinance (those being the M50, M52, M54 and M58 districts) were unique in that they *precluded* virtually all other *commercial* uses, with the exception of commercial activities associated with a manufacturing plant. *See, e.g.,* SDCZO § 2500 (App. 206) ("The M50 [basic industrial] Use Regulations are intended to create and preserve areas for ***basic manufacturing operations which evidence no or very low nuisance characteristics***.[7] ***Non-manufacturing uses are***

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[6] Ordinance 9469 also provided for the discretionary issuance of a six-month extension of the three-year amortization period. Tollis applied for such an extension and although requiring an administrative appeal, it was granted a six-month reprieve through January 14, 2006. Magnolia has been operating its establishment since then in a fashion which it believes constitutes a non-adult business, and therefore not violative of the current adult use zoning provisions. San Diego County has felt otherwise, and within three days of the ruling by the federal district court upholding the constitutionality of Ord. 9469, the County brought a zoning enforcement action against both Tollis and Magnolia. That matter is now pending before the California Court of Appeals captioned as *1560 N. Magnolia Ave., LLC v. County of San Diego*, Case No. D052382. That appeal, however, does not deal with the constitutional issues raised herein.

[7] Given the governmental assumption that adult uses are associated with a variety of adverse secondary effects, this zone

(Continued on following page)

restricted to those providing central support services to manufacturing plants and their personnel") (emphasis and clarification added). *See also* SDCZO §§ 2520, 2540, and 2580 (App. 210, 214, 215, 226) (similar requirements for the M52, M54 and M58 zones). In contrast, the M56 (mixed use) manufacturing district allows for a wide variety of commercial businesses; but not adult uses. App. 219-225.

On October 11, 2002, Tollis and Magnolia filed a complaint in federal district court challenging the constitutionality of Ord. 9469 as well as a number of adult business regulatory provisions[8] that had been enacted at the same time.[9] During discovery, the Plaintiffs propounded certain interrogatories to the County in regard to its apparent contention that relegating adult businesses to industrial zones, as opposed to commercial districts, would further the governmental interest of ameliorating adverse secondary effects. The responses thereto are directly relevant to this petition in three regards.

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would then seem to be a particularly *inappropriate* place to permit the establishment of an adult entertainment business.

[8] One of which did, indeed, preclude the display of nudity in an adult entertainment facility. The regulatory ordinances challenged below are not, however, part of this petition.

[9] A separate complaint was filed by Fantasyland Video, Inc., which also challenged the amendments to the County's adult business regulatory ordinances. The district court consolidated the two cases.

First, the County articulated, for the first time since the Ordinance was proposed, that it believed that restricting adult entertainment establishments to industrial zones would further the governmental concerns of reducing "*noise and traffic.*" *See* App. 239, 240, 243, 244 (responses to interrogatory No.'s 1 and 5).[10] Second, the County explicitly took the position, relying in part upon Justice Kennedy's concurring opinion in *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002), that it did not have any burden of producing – or even merely *citing* to – evidence that "establishes that requiring adult entertainment establishments to be located in the industrial zones has reduced negative secondary effects." App. 240, 241, 243-245, 247 (responses to interrogatory No.'s 1, 4, 5 and 8). Third, the County candidly acknowledged that relegating adult uses to industrial districts would have the effect of reducing the patronage of those establishments. App. 240 (response to interrogatory No. 1) ("Finally, ***fewer citizens tend to frequent industrial zones compared to commercial zones***, particularly at night. Thus, the zoning change should reduce crimes such as assault, battery, robbery and property theft ***by reducing the number of potential victims***") (emphasis added). *See also*

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[10] The County also asserted that reduction in noise and traffic would be accomplished by the new regulatory provision that required adult uses to close between 2:00 a.m. and 6:00 a.m. App. 250 (response to interrogatory 17).

App. 242, 244, 246, 247, 250 (responses to interrogatory No.'s 4, 5, 8 and 17) (similar).

The parties filed cross motions for summary judgment and on June 14, 2005, the district court issued its ruling. In particular regard to this petition, the court granted summary judgment in favor of the County by finding Ord. 9469 to be fully consistent with the First and Fourteenth Amendments. App. 87-139. It did so even though it found that there were arguably only 227.03 acres of industrially zoned land *theoretically* available[11] for adult uses out of a total land area of 2,286,059 acres (or just ***.009931%*** of the unincorporated areas of the County). App. 121.

The district court ignored this comparison, however, and analyzed instead the potential "adult" acreage only in relation to the amount of industrially and commercially-zoned lands; declaring this percentage (4.46%) to be constitutionally sufficient. App. 122, 124, 125. The court found this a more relevant comparison on the basis of its observation that the determination of whether an adult use has a "reasonable opportunity to locate" under *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), focused on the "'actual business real estate market' where a generic commercial enterprise could potentially operate." App. 122, *quoting Isbell v. City of San Diego*, 258 F.3d

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[11] The point that courts can "count" land that is *theoretically*, but not *actually* available is discussed in Section I(C), *infra*.

1108, 1112-1113 (9th Cir. 2001). It reached this conclusion despite the fact that industrial zones were off-limits to virtually all other forms of commercial activities and the fact that commercial zones no longer permitted adult uses of any kind. Following the entry of final judgment (App. 164), Tollis and Magnolia appealed.

The Ninth Circuit issued its published opinion on October 10, 2007. First, it concluded that in evaluating whether, pursuant to *Renton*, a speech-restrictive zoning ordinance provided for "alternative avenues of communication" by affording an adult use a "reasonable opportunity to open and operate," the potential relocation sites need *not be available for "commercial purposes generally."*[12] App. 12. It reached

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[12] This conclusion appears to be in direct conflict with no less than four prior decisions of that court. *See, e.g., Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1530-1531 (9th Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994) (the court must look to "whether it is reasonable to consider a particular location site as part of the ***commercial real estate market***"); *Lim v. City of Long Beach*, 217 F.3d 1050, 1054-1055 (9th Cir. 2000), *cert. denied*, 531 U.S. 1991 (2001) (restrictive leases banning adult entertainment establishments did not render such parcels "unavailable for constitutional purposes, since the site may be ***available to commercial enterprises other than adult entertainment businesses***"); *Diamond v. Taft*, 215 F.3d 1052, 1056 (9th Cir. 2000), *cert. denied*, 531 U.S. 1072 (2001) (currently occupied sites could also count for the reason that the plaintiff there "did not offer sufficient evidence to show that these sites would not reasonably become available to ***any commercial enterprises***"); and *Isbell v. City of San Diego*, 258 F.3d 1108, 1113 (9th Cir. 2001) (the issue in determining whether the government has provided for sufficient alternative

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this conclusion even though the district court's "comparison" analysis upholding the constitutionality of the Ordinance was predicated upon just the opposite determination.

Second, the appellate court opined that the "proportionality requirement"[13] as set forth in Justice Kennedy's *Alameda Books* concurrence – which has uniformly been determined by the inferior courts to be the constitutional holding of that plurality decision[14] – was really nothing more than a mere reiteration of the "alternative avenues of communication" inquiry required by this Court in *Renton*. App. 6-9. The opinion also determined that the County had satisfied its burden under the proportionality test by simply establishing, under Ninth Circuit precedent,

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avenues of communication "is whether any site is part of an ***actual market for commercial enterprises generally***") (all emphasis added).

[13] The Ninth Circuit coined this phrase. *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153, 1161-1162 (9th Cir. 2003), *cert. denied*, 541 U.S. 973 (2004).

[14] *See, e.g., N.W. Enterprises, Inc. v. City of Houston*, 352 F.3d 162, 181 & n. 18, 183 (5th Cir. 2003), *cert. denied, sub nom. Ice Embassy, Inc. v. City of Houston*, 543 U.S. 958 (2004); *729, Inc. v. Kenton County Fiscal Court*, 515 F.3d 485, 491 (6th Cir. 2008); *Ben's Bar v. Village of Somerset*, 316 F.3d 702, 721-722 (7th Cir. 2003); *SOB, Inc. v. County of Benton*, 317 F.3d 856, 861-862 (8th Cir. 2003), *cert. denied*, 540 U.S. 820 (2003); *Center for Fair Public Policy*, 336 F.3d at 1161; *Abilene Retail #30, Inc. v. Board of Commissioners of Dickson County*, 492 F.3d 1164, 1177-1178 (10th Cir. 2007), *cert. denied*, ___ S.Ct. ___ (Mar. 31, 2008) (No. 07-972).

that there were sufficient theoretically available alternative sites for the establishment of an adult use. App. 9. In reaching this conclusion, however, the appellate court made no attempt to analyze how "speech would fare" (*Alameda Books*, 535 U.S. at 450 (Kennedy, J., concurring)) by banishing adult uses to the industrial areas of the unincorporated County.

Third, the court of appeals rejected the testimony of Plaintiffs' expert witness that had been submitted in an attempt to "cast direct doubt" (*Alameda Books*, 535 U.S. at 438-439) upon the purported secondary effects justification for the enactment of the Ordinance. The panel concluded that even if it were all true (the testimony challenged the purported connection between adult uses and crime/property values), the problems of "noise and traffic"[15] were sufficient governmental interests to justify removing adult uses from *commercial* zones and relocating them exclusively to certain, limited, *manufacturing* areas. App. 8, 9. And, the appellate court reached this conclusion irrespective of the acknowledged fact that virtually all other commercial uses were precluded in the County's industrial zones. App. 11.

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[15] Because these considerations were not even articulated as governmental interests of concern in the preambles to the Ordinance, and because the County provided no evidentiary basis whatsoever to support a claim that "adult" establishments caused elevated levels of noise and traffic, the Plaintiffs' expert witness simply did not address these matters in his declaration.

Finally, in determining that the County had satisfied its burden under the proportionality test by demonstrating sufficient "alternative avenues of communication," the Ninth Circuit concluded that even if there were insufficient industrial locations within San Diego County to which adult businesses could relocate, it could "fairly be *presumed*" that there were other suitable areas for adult uses "*outside the territory governed by the ordinance in question.*" App. 14 (emphasis added).

Predicated upon these novel conclusions, which drastically expand the government's ability to suppress disfavored expression through zoning regulations justified upon the pretextual concerns of "noise and traffic," the Plaintiffs timely filed a petition for panel rehearing with suggestion for rehearing en banc, which was denied.

This Petition follows.

REASONS FOR GRANTING THE WRIT

I. AS A RESULT OF THE HIGHLY-FRACTURED NATURE OF THIS COURT'S "SECONDARY EFFECTS" PLURALITY OPINIONS, THE INFERIOR COURTS HAVE BEEN UNABLE TO DEVELOP A SET OF COHERENT, OBJECTIVE, AND UNIFORMLY-APPLIED STANDARDS TO SPEECH-RESTRICTIVE, CONTENT-CORRELATED, LAWS.

In *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), this Court declared that the enactment of zoning ordinances directed at "adult" businesses could be justified by the "secondary effects" of such establishments. These laws would be declared constitutional if they were "designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Id.* at 47. Since *Renton*, however, this Court's decisions regarding the application of the "secondary effects" doctrine and its expansion beyond zoning so as to justify the enactment of operating regulations of expressive businesses, have comprised of a trio of highly-fractured plurality opinions: *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) ("*Pap's II*"); and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002).

The pluralities in *Barnes* and *Pap's II* determined that the constitutionality of nudity prohibitions should be evaluated pursuant to the intermediate

scrutiny test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968).[16] *Alameda Books*, like *Renton*, dealt with the zoning of adult businesses. Yet, lower courts have had great difficulty in discerning how these three plurality rulings are to be applied.

In attempting to employ the test of *Marks v. United States*, 430 U.S. 188, 193 (1977) (the "holding" of a plurality decision "may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds"), a number of courts have recently devoted entire portions of their opinions just trying to decipher what these split decisions mean.[17] This has resulted in conflicting rulings below, particularly in regard to the governmental interest prongs of *Renton/O'Brien*.

As this Court has stated, before enacting a secondary effects-based law a city or state need not

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[16] This test analyzes, among other things, whether the regulation furthers an important or substantial governmental interest. *O'Brien*, 391 U.S. at 377.

[17] *See, e.g., Commonwealth v. Jameson*, 215 S.W.3d 9, 21-27 (Ky. 2007), *cert. denied*, 128 S.Ct. 190 (2007); *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251, 1259-1264 (11th Cir. 2003), *cert. denied*, 541 U S. 988 (2004); *Ben's Bar*, 316 F.3d at 717-722; *and SOB, Inc. v. County of Benton*, 317 F.3d 856, 860-864 (8th Cir. 2003), *cert. denied*, 540 U.S. 820 (2003). *See also Pap's A.M. v. City of Erie*, 719 A.2d 273 (Pa. 1998) ("*Pap's I*") (attempting to determine the holding of *Barnes*). And, courts have also noted the difficulty in applying *Marks* to these decisions where there is no one opinion that can be considered to express the consensus of a majority of Justices. *See, e.g., Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 134 (6th Cir. 1994).

conduct new studies or produce evidence independent of that already generated by other municipalities before enacting a secondary effects-based law, "so long as whatever ***evidence*** the [government] relies upon is ***reasonably believed to be relevant*** to the problem that [it] addresses." *Renton*, 475 U.S. at 51-52 (clarification and emphasis added). But, how a court determines if this standard is met is less than apparent.

In fact, in rejecting – as a result of this confusing body of caselaw – this Court's secondary effects jurisprudence as a basis for interpreting its State's free speech rights, the Pennsylvania Supreme Court observed that it is "notable that the five Justices in the U.S. Supreme Court [in *Pap's II*] who agreed that the *O'Brien* test applied *could not agree upon the precise evidentiary showing which would be required to satisfy that test.*" *Pap's A.M. v. City of Erie*, 812 A.2d 591, 609-610 (Pa. 2002) ("*Pap's III*") (clarification and emphasis added). *See also Commonwealth v. Jameson*, 215 S.W.3d 9, 15 (Ky. 2007), *cert. denied*, 128 S.Ct. 190 (2007); (Supreme Court of Kentucky undertaking a thorough analysis of the secondary effects doctrine and First Amendment jurisprudence, but noting that "*[t]his task is complicated by the fact that, to date, there have been no clear majority standards formulated for evaluating nudity ordinances given that almost all of the decisions in this area were decided by plurality opinions*"); and *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1197 (10th Cir. 2003) ("The standards for the *quantity and nature*

of the empirical evidence needed to uphold a city ordinance based on the negative secondary effects of sexually oriented speech in general, or nude dancing particular, are *continuing to evolve*") (all emphasis added). And, legal commentary has been equally critical of the confusing nature of the Court's decisions on these issues.[18]

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[18] *See, e.g.*, Roger Enriquez, Jeffrey M. Cancino & Sean P. Verano, *A Legal and Empirical Perspective on Crime and Adult Establishments: A Secondary Effects Study in San Antonio, Texas*, 15 Am. U.J. Gender Soc. Pol'y & L. 1, 39 (2006) ("The post-Alameda jurisprudence makes it clear that courts are struggling with the issue of 'quantum and quality' of evidence necessary to establish an association or link between sexually oriented businesses and negative secondary effects"); Christy A. Fisher, *Sixth Annual Review of Gender and Sexuality Law: I. Constitutional Law Chapter: Nude Dancing*, 6 Geo. J. Gender & L. 335 (2005) ("Restrictions on nude dancing implicate the First and Fourteenth Amendments of the U.S. Constitution. Courts have issued vague and contradictory opinions on the topic, making the conflict between constitutional protections of erotic expression and public decency laws even more confusing"); Maggie Sklar, *Constitutional Law Chapter: Nude Dancing*, 5 Geo. J. Gender & L. 95-96 (2004) ("The lack of a clear majority regarding the reasoning of the case and application of the standard used in Pap's A.M. has led to some inconsistency in the lower courts"); and Christopher J. Andrew, *The Secondary Effects Doctrine: The Historical Development, Current Application, and Potential Mischaracterization of an Elusive Judicial Precedent*, 54 Rutgers L. Rev. 1175, 1212 (2002) ("Alameda Books (sic), on the other hand, represents a missed opportunity for the court to come to a decision on the intricacies of the secondary effects analysis, which would be useful once the Court begins applying the analysis consistently outside the area of adult entertainment regulations. It seems clear that the evidentiary burdens and legislative motivations are not entirely clear

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Moreover, the lack of clarity of this Court's secondary effects doctrine is leading appellate courts to explicitly conclude that the *truth* simply does not matter in these types of challenges. *See Jameson*, 215 S.W.3d at 32 (" . . . it is *irrelevant* whether the local government is *actually wrong* regarding the extent of all the secondary effects that have actually occurred or may occur in the future") (emphasis added); and *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 831 (7th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000) ("*DiMa*'s contradictory evidence would be highly probative *if our task were to discover the objective truth about the effect of* [the plaintiff] *operating in Hallie. But our task under the First Amendment is far different*") (emphasis and clarification added). These ominous jurisprudential developments permit the government to impermissibly suppress disfavored – but nevertheless protected – expression, and warrant further review by this Court.

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from the fractured nature of many of the recent secondary effects opinions and the different discussions and rationales that are provided throughout these opinions").

A. THE LOWER COURTS CANNOT AGREE UPON WHEN, AND EVEN WHETHER, A GOVERNMENTAL UNIT NEEDS TO RELY ON SECONDARY EFFECTS INFORMATION WHEN ENACTING A CONTENT-CORRELATED REGULATION.

Lower courts disagree on *when*, and even *whether*, the government must "rely" on secondary effects information in order to constitutionally justify the enactment of speech-restrictive laws. This has occurred, in great measure, because of the highly-fractured nature of *Barnes* and the fact that Justice Souter's concurrence is generally considered to be the "holding" of that decision.

In his view, a governmental interest need not be identified at the time of legislative enactment, but may be established later during litigation. *Barnes*, 501 U.S. at 582 ("Our appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a ***current*** governmental interest in the service of which the challenged application may be constitutional") (Souter, J., concurring) (emphasis added).

Utilizing *Marks*, numerous courts adopt this precept.[19] Some courts even conclude that *no nexus*

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[19] *See, e.g., Jameson*, 215 S.W.3d at 22; *Mitchell v. Comm'n on Adult Entertainment Establishments of Delaware*, 10 F.3d 123, 136-137 (3rd Cir. 1993); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 515 (4th Cir. 2002); *Fantasy Ranch, Inc. v. City of Arlington, Texas*, 459 F.3d 546, 560 (5th Cir. 2006); *DiMa Corp.*,

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need be established *at any point*.[20] Other courts, however, come to the conclusion that in order for a speech-restrictive law to be upheld, the secondary effects record must be made at the time of legislative enactment (in view of *Renton*'s command that the government must "rely" upon evidence reasonably believed to be relevant to the problems that it is attempting to address).[21]

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185 F.3d at 829-830; *Farkas v. Miller*, 151 F.3d 900, 903, 905 (8th Cir. 1998); and *Essence, Inc. v. City of Federal Heights*, 285 F.3d 1272, 1284-1285 (10th Cir. 2002), *cert. denied*, 537 U.S. 947 (2002). *See also Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 274 F.3d 377, 394 n. 4 (6th Cir. 2001), *cert. denied*, 535 U.S. 1073 (2002) (appellate court coming up with its own justification for a license disclosure provision even though it did not comport with the "codified" reason for that requirement set forth in the challenged ordinance).

[20] *See, e.g., Illusions - Dallas Private Club, Inc. v. Steen*, 482 F.3d 299, 300-310, 313 (5th Cir. 2007) (Fifth Circuit concluding that regulation prohibiting adult businesses from obtaining liquor licenses was "content neutral" even though it also found that "there simply is *no evidence*" to support a connection "between the combination of alcohol service and erotic dancing and negative secondary effects") (emphasis in original).

[21] *See, e.g., White River Amusement Pub, Inc. v. Town of Hartford*, 481 F.3d 163, 171-172 (2nd Cir. 2007), and cases cited therein. *See also G.Q. Gentlemen's Quarters, Inc. v. City of Lake Ozark*, 83 S.W.3d 98, 102-103 (Mo. 2002) (court was unwilling "to presume that the City enacted [a regulation of erotic dancing where liquor is served] to prevent negative secondary effects"); *Holmberg v. City of Ramsey*, 12 F.3d 140, 143 (8th Cir. 1993), *cert. denied*, 513 U.S. 810 (1994) ("We agree with Holmberg that it is ***not enough for the City merely to give lip service*** to a legitimate governmental interest. The City also has the burden

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Accordingly, in those jurisdictions that allow post-enactment secondary effects substantiation, litigants who are attacking a speech-restrictive law, such as those here, can appropriately "cast doubt upon" the secondary effects that are articulated in a Bill's legislative preambles but nevertheless find themselves losing the constitutional challenge when another secondary effect is pretextually raised in court to justify the law (here, "noise and traffic").[22]

The lack of clarity from this Court on these issues has lead to a point where there often appears to be little-to-no scrutiny given as to whether a claimed governmental concern can truly be tied to

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to ***substantiate*** its declaration that zoning regulations are ***needed to curb unwanted secondary effects*** of sexually-oriented businesses that operated in *Ramsey*") (emphasis added); *Discotheque v. City Council of Augusta*, 449 S.E.2d 608, 609 (Ga. 1994) (preambles to legislation indicating a content-neutral purpose are only "self-serving conclusory hearsay").

[22] And, some of these belated "concerns" are of a questionable connection to the regulations at issue. *See, e.g.*, *SOB, Inc.*, 317 F.3d at 862-863 (Eighth Circuit claiming that a ban on live nude dancing ***may address*** the adverse secondary effects of illegal activity by dancers and customers, such as "drug use, prostitution, ***tax evasion and fraud***"); and *World Wide Video of Wash. Inc. v. City of Spokane*, 368 F.3d 1186, 1190, 1195 (9th Cir. 2004) (adult business zoning ordinance attacked with evidence that the adult businesses in Spokane neither contributed to the depreciation of property values nor resulted in increased calls for police service, with the Ninth Circuit concluding that the plaintiff had not succeeded in "casting direct doubt" because ***litter*** was a sufficient governmental justification for the enactment of the ordinances in question) (all emphasis added).

"adult" entertainment, and where, irrespective of this Court's seemingly clear comments in *Pap's II* and *Alameda Books*, there really may then be no ability to challenge the mere *assertion* of the necessity for a law that purports to address adverse secondary effects.

For example, here, the County contended merely by way of an interrogatory response that the problems of noise and traffic would be reduced by mandating adult uses to vacate commercial zones and move to industrial areas, with no requirement being imposed by the lower courts that a record be made to demonstrate the efficacy of such a law. *See also White River Amusement Pub., Inc. v. Town of Hartford*, 481 F.3d 163, 171 (2nd Cir. 2007) (" . . . a city need not prove . . . such a link [between a secondary effect and adult businesses] or prove that its ordinance will be effective suppressing secondary effects") (clarification added). This confusion has even led at least two appellate courts to recently state that they simply "will not specify the methodological standards to which [a litigant's] evidence must conform" in order to successfully challenge the stated secondary effects basis for the enactment of a speech-restrictive law. *See City of Chicago v. Pooh Bah Enter., Inc.*, 865 N.E.2d 133, 159 (Ill. 2006), *cert. denied,* 128 S.Ct. 127 (2007); and *Gammoh v. City of La Habra*, 395 F.3d 1114, 1126-1127 (9th Cir. 2005) *cert. denied,* 546 U.S. 871 (2005) (clarification added).

B. THERE IS NO CONSENSUS IN THE LOWER COURTS AS TO WHAT EVIDENCE SATISFIES THE "ALTERNATIVE AVENUES OF COMMUNICATION" STANDARD.

In determining whether a zoning restriction of speech-related businesses provides sufficient alternative avenues of communication, *Renton* simply notes that such a regulation must not effectively deny adult uses "a reasonable opportunity to open and operate," because doing so would "greatly restrict[] access to lawful speech." 475 U.S. at 54 (quoting *Young v. American Mini Theatres*, 427 U.S. 50, 71 n. 35 (1976)). Yet, as to whether or not a specific restriction meets this generalized standard, the Court has provided only one minimal guidepost; that being that more than 5% of the entire land area of *Renton*, which consisted of "ample, accessible real estate . . . in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways, and roads," was sufficient. *Id.* at 53. However, courts have not necessarily considered this figure as a constitutional "floor" below which zoning ordinances must not go, and some have reduced the acceptable level of *theoretically* available land to such an infinitesimally small amount that now, here, *1/1000th of 1%* of the land area is deemed constitutionally adequate in order to provide speech-related businesses a "reasonable opportunity to open and operate." The disparity

of rulings on this topic can be demonstrated in a number of different ways.

First, even for those courts that make a *Renton*-type comparison using the total land area subject to the zoning regulation, there is no consistency of determining how much theoretically available land is necessary.[23] In fact, while one court observes that

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[23] *Compare, e.g., Z.J. Gifts D-4, L.L.C. v. City of Littleton*, 311 F.3d 1220, 1240 (10th Cir. 2002), *reversed on other grounds*, 541 U.S. 774 (2004) (upholding an ordinance that left "just under 1% of the total area of the City"); *City of Crystal v. Fantasy House, Inc.*, 569 N.W.2d 225, 230-231 (Minn.App. 1997) (0.9% of total area sufficient); *Northwest Av. Novelties, Inc. v. City of Chicago*, 88 F.3d 441, 445 (7th Cir. 1996) ("less than 1%" of City lands constitutionally sufficient); and *D.H.L. Associates, Inc. v. O'Gorman*, 199 F.3d 50, 59-60 (1st Cir. 1999), *cert. denied*, 529 U.S. 1110 (2000) (0.09867% of total area held sufficient where all land was held by single owner willing to sell for the "right price") *with Walnut Properties v. City of Whittier*, 861 F.2d 1102 (9th Cir. 1988), *cert. denied*, 490 U.S. 1006 (1989) (1.4% of the city's total land area inadequate); *University Books and Videos, Inc. v. Miami-Dade County*, 132 F.Supp.2d 1008, 1114 (S.D. Fla. 2001) (0.0092% of developed land available for adult insufficient); *Executive Arts Studio Inc. v. City of Grand Rapids*, 227 F.Supp.2d 731, 755 (W.D. Mich. 2002), *aff'd*, 391 F.3d 783 (6th Cir. 2004) (0.058% available for adult was insufficient); *Fly Fish, Inc. v. City of Cocoa Beach*, 337 F.3d 1301, 1312 (11th Cir. 2003) (less than 1% of the total acreage was found inadequate); *T & A's, Inc. v. Town Bd. of Town of Ramapo*, 109 F.Supp.2d 161, 173-174 (S.D.N.Y. 2000) (less than 0.6% of total land insufficient); *Christy v. Ann Arbor*, 824 F.2d 489 (6th Cir. 1987), *cert. denied*, 484 U.S. 1059 (1988) (0.23% of total land insufficient); *Franklin Jefferson, Ltd. v. City of Columbus*, 244 F.Supp.2d 835 (S.D. Ohio 2003) (0.047% of city's total acreage insufficient); and *Pack Shack, Inc. v. Howard County*, 832 A.2d 170 (Md. 2003) (0.01% of total land held insufficient).

post-*Renton* cases "generally found the number [of sites] to be *inadequate* if . . . under 1% of the city acreage is potentially available," another comments that "courts have *routinely* upheld zoning ordinances where less than 1% of the land was available for adult businesses to operate." *Compare University Books & Videos, Inc. v. Miami Dade County*, 132 F.Supp.2d 1008, 1014 (S.D. Fla. 2001) (emphasis and clarification added) *with MJ Entertainment Enterprises, Inc. v. City of Mt. Vernon*, 328 F.Supp.2d 480, 485-486 (S.D.N.Y. 2004).

Second, and as is the case here, when the percentage of land becomes so small as to not pass the "giggle" test, the courts simply *change the denominator* of the equation. Rather than, as was the case in *Renton*, comparing potential adult sites to the *total land of a municipality*, these courts simply compare such sites to a much smaller area; usually that zoned for commercial, or industrial, or a combination of the two.[24]

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[24] App. 122; *Alexander v. City of Minneapolis*, 928 F.2d 278, 283-284 (8th Cir. 1991) (6.6% of commercial land sufficient); *City of Crystal*, 569 N.W.2d at 230-231 (less than 1% of total area, but 15% of commercial plus industrial area, acceptable); *MJ Entertainment Enterprises*, 328 F.2d at 485 (noting that although *Renton* referred to the percent of total land available, "district courts have not been precise as to whether the relevant percent is based on the total land or the percent of land available for commercial uses, and have applied both methods," and concluding that "[i]n the case of Mt. Vernon, total commercial land area, rather than total land area, *seems the appropriate choice*")

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Such a comparison, permitted by the lack of clear direction from this Court, significantly, but misleadingly, skews the constitutional analysis. Simply by changing the denominator, the district court here comes close to a *Renton*-like 5%-plus figure (actually 4.46% – App. 122) by comparing the 227 acres theoretically available for adult businesses to only the 5,084 acres that are zoned commercial or industrial. *Id.* This is in stark contrast to a *Renton*-type of comparison, which would have yielded a figure here of only 0.001%. And, the district court created this comparison by evaluating the land potentially available to *generic* commercial enterprises, which are specifically *prohibited* in the manufacturing zones at issue. In this scenario, it is difficult to say with a straight face that speech-related businesses are "on equal footing with other prospective purchasers or lessees." *Renton*, 475 U.S. at 54.[25]

(emphasis added); and *Casanova Entertainment Group v. City of New Rochelle*, 375 F.Supp.2d 321, 340 (S.D.N.Y. 2005) (2.77% of light industrial land constitutionally adequate).

[25] Courts have also used other measures to determine whether a municipality has provided for sufficient alternative avenues of communication, such as the number of sites theoretically available in relation to population, and the supply and demand for such businesses. The uniformity of decisions utilizing those standards fares no better, but in any event, the lack of consistency in regard to the one measure that this Court articulated in *Renton* provides sufficient basis to demonstrate that further direction from this Court is needed.

C. THE LACK OF CLARITY EXTENDS TO JUSTICE KENNEDY'S PROPORTIONALITY TEST IN *ALAMEDA BOOKS*.

The Ninth Circuit concluded that Justice Kennedy's concurring opinion in *Alameda Books,* which holds that the quantity of speech must be left substantially undiminished, is "shorthand for asking whether the ordinance will impose a significant or material inconvenience on the consumer of the speech." App. 7. The appellate court then opined that as long as there is a "sufficient number of suitable relocation sites," the County can, in requesting summary judgment in its favor, "reasonably ***assume***" that speech will not be diminished. App. 9 (emphasis added). Respectfully, Petitioners assert that this is an incorrect reading of Justice Kennedy's proportionality test, and results from the lack of clarity by this Court on the secondary effects doctrine.

First, Justice Kennedy's "how speech will fare" standard is a component of the substantial governmental interest test of *Renton*, and not the "alternative avenues of communication" element. *See Alameda Books,* 535 U.S. at 449-450 (Kennedy, J., concurring). The Court of Appeals conflates these two separate and distinct concepts.

Second, it seems apparent that what Justice Kennedy contemplated when imposing the "how speech will fare" analysis was to require the examination of whether there were relocation sites that an adult business could ***actually*** purchase or lease.

This is because, as this Court is aware, the alternative avenues of communication component has resulted in the creation of the legal fiction that sites that are not *actually* available nevertheless "count" for constitutional purposes.[26] Consequently, Justice Kennedy could only have meant that when examining whether speech would be ***really*** affected, this legal fiction must be ignored and an examination must be made as to whether there are relocation sites that are

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[26] *See, e.g., Lim v. City of Long Beach*, 217 F.3d 1050, 1055 (9th Cir. 2000), *cert. denied*, 531 U.S. 1991 (2001) (restrictive leases that did not permit an adult use counted); *Diamond v. Taft*, 215 F.3d 1052, 1056 (9th Cir. 2000), *cert. denied*, 531 U.S. 1072 (2001) (currently occupied locations counted); *Daytona Grand, Inc., et al. v. City of Daytona Beach, Florida*, 490 F.3d 860, 871-872 (11th Cir. 2007), *cert. denied*, 128 S.Ct. 1246 (2008) ("It is irrelevant for our purposes that all of the land in the M-5 district [one of two districts in which an adult business can locate] is owned by a single private landowner who may be reluctant or unwilling to develop or sell the land") (clarification added); *Woodall v. City of El Paso*, 49 F.3d 1120, 1125-1126 (5th Cir. 1995), *cert. denied*, 516 U.S. 988 (1995) ("The Adult Businesses claimed that some sites were unavailable because the owner of the site probably would not rent or sell to an adult business, or because the building was currently occupied or leased, neither of which is of any obvious concern under *Renton*"); *Alexander*, 928 F.2d at 283 ("Additional testimony from Alexander that no one would sell or lease property on which he could relocate his businesses was also irrelevant to the First Amendment inquiry"); and *Bronco's Entertainment, Ltd. v. Charter Township of Van Buren*, 421 F.3d 440, 452 (6th Cir. 2005) ("The plaintiffs' witnesses also discounted certain sites because the sites are occupied or because the current owners might be unwilling to sell to a sexually oriented business. Under *Renton*, these factors are irrelevant").

actually available (a concern that was simply not applicable to the particular zoning aspects at issue in *Alameda Books*). The Ninth Circuit opinion makes no such analysis, and more importantly never places the burden upon the County to establish this element of the substantial governmental interest test.

Third, the assumption that the appellate decision permits the County to make must be placed in context of the specific circumstances at issue in *Alameda Books*; that being the granting of summary judgment ***against*** the City of Los Angeles. While Justice Kennedy permitted these assumptions to be made ***"in the first instance,"*** he further stated that if they "can be proved unsound at trial, then the ordinance might not withstand intermediate scrutiny." 535 U.S. at 453 (Kennedy, J., concurring). Here, however, summary judgment was granted ***against*** the ***Petitioners*** without ever permitting them an opportunity to challenge these assumptions at trial.

Because of the lack of clear standards from this Court, the inferior courts are failing to adhere to appropriate constitutional requirements, which is exemplified by the lower decision here. As such, the petition should be granted.

II. WHETHER A ZONING ORDINANCE OF EXPRESSIVE BUSINESSES SATISFIES THE "REASONABLE OPPORTUNITY TO OPEN AND OPERATE" STANDARD UNDER *RENTON* WHEN IT RELEGATES SUCH USES ONLY TO INDUSTRIAL ZONES THAT PRECLUDE VIRTUALLY ALL OTHER COMMERCIAL ACTIVITIES, IS AN IMPORTANT CONSTITUTIONAL QUESTION THAT WARRANTS REVIEW BY THIS COURT.

Until the decision below, the Ninth Circuit had consistently held, on no less than four occasions, that potential sites for adult uses could be "counted" for constitutional purposes only if they were part of the ***commercial*** real estate market. *See n. 12, supra.* Other circuits have reached the same conclusion.[27]

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[27] *See, e.g., Grand Brittain, Inc. v. City of Amarillo*, 27 F.3d 1068, 1069-1070 (5th Cir. 1994) (noting that the ordinance "affords a reasonable opportunity to bid in the commercial real estate market"; that the primary constitutional question is "where the city offers sites from a commercial real estate market – that is sites that businesses can locate on"; that *Renton* and *Woodall* "ensure that adult businesses have access to ***a commercial real estate market*** . . . "; and that their role is then to decide whether the sites identified "give Grand Brittain a reasonable chance ***to compete in the commercial real estate market***"); *Hickerson v. City of New York*, 146 F.3d 99, 106 (2nd Cir. 1998) (courts are to look at "whether the sites are suitable for '***some generic commercial enterprise***' "); *Woodall*, 49 F.3d at 1126 (court analyzes potential sites in view of whether they are considered part of "***the commercial real estate market***"); and *Alexander*, 928 F.2d at 283 n. 4 (court held that sufficient relocation sites were available when the ordinance gave adult

(Continued on following page)

But, while the Ninth Circuit opinion here began its analysis with this general statement,[28] it nevertheless concluded that its prior opinions had not held that "industrial sites are potentially available for relocation only so long as they may be used for a commercial purpose generally." App. 12. The appellate court reached this conclusion by asserting that the question was not whether an "industrial zone *permits* general commercial business," but only whether such land "*is suitable for*" such commercial activities. App. 11 (emphasis in original).

The linguistic gymnastics in which the Ninth Circuit was required to engage in order to uphold Ord. 9469, demonstrates that review by this Court is warranted.

Certainly, there is a reason that courts have, at least up to this point, observed that potential relocation sites must be available for commercial enterprises generally, and that is to ensure that a municipality does not use zoning as a pretext to suppress disfavored expression. Because communities do not overly restrict the establishment of generic commercial uses, engrafting this test component guarantees that there will be *actually* available

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theaters "access to at least 6.6% of the ***total acreage of commercial land***") (all emphasis added).

[28] Noting that a potential relocation site "must be considered part of an actual business real estate market for *commercial enterprises generally*." App. 9 (emphasis added) (quoting *Lim*, 217 F.3d at 1054).

alternative sites for "adult" speech – irrespective of whether *some* of the *theoretically* available areas that are permitted to be counted under the alternative avenues of communication standard are *realistically unavailable* (by lease, non-desire to sell or lease property to an adult business, restrictive covenant, etc.).

As noted above, the ordinance in *Renton* was constitutional because it left more than 5% of the entire land area of the city open to use as adult threatre sites, which comprised of "acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways and roads." 475 U.S. at 53. Speech will not be suppressed when such diverse areas are available for relocation.[29] The Ninth Circuit opinion, however, does disservice to its four earlier applications of *Renton*, to the rulings of the other circuits that have examined this issue, and to *Renton* itself, and permits zoning so restrictive that there is no reasonable likelihood that adult businesses will be able to open and operate.

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[29] Similarly, the few other decisions that have upheld the relegation of adult businesses to industrial zones do not permit the oppressive limitations approved here. *See Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683, 688 (10th Cir. 1998) (even with the industrial zone restriction, 3.6% of the city's total area was realistically available to adult businesses); and *Cook County v. Renaissance Arcade and Bookstore*, 522 N.E.2d 73, 134 (Ind. 1988) (industrial areas available to adult uses still constituted 8.9% of the county's total acreage).

III. IF GENERAL ATTRIBUTES OF COMMERCIAL ENTERPRISES CAN BE USED AS A BASIS TO ZONE "ADULT" BUSINESSES EXCLUSIVELY INTO INDUSTRIAL AREAS, THERE IS THEN NO LIMIT UPON THE ABILITY OF GOVERNMENT TO USE PRETEXTUAL JUSTIFICATIONS TO SUPPRESS DISFAVORED EXPRESSION.

In accordance with *Alameda Books*, the Plaintiffs attempted to "cast direct doubt" (535 U.S. at 438-439) upon the County's purported concern of "adverse secondary effects" as being the justification for the enactment of the Ordinance. They did so through a detailed declaration of Dr. Daniel Linz, Ph.D.[30] The panel rejected his testimony because, it asserted, he:

> " . . . did not rebut the County's ***evidence*** with regard to ***noise and traffic***. The evidence presented by Dr. Linz addressed only late night crime and property values. The County considered these factors, but its ***purported rationale*** for isolating adult businesses to industrial zones also included combating increased noise and traffic."

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[30] For a recent discussion of Dr. Linz's work, *see Abilene Retail,* 492 F.3d at 1185-1187 (concurring opinion joined by the entire panel).

App. 8 (emphasis added). These assertions, however, demonstrate the slippery slope of the ill-defined secondary effects doctrine.

First, the reduction of "noise and traffic" is ***not*** listed ***anywhere*** in the Ordinance preambles as being a governmental interest meant to be furthered by the zoning restrictions. App. 169-174. As stated above, these purported "concerns" were only raised – for the first time – in response to interrogatories.

Second, there was simply no "evidence" ***whatsoever*** relied upon by the County at the time of the enactment of the Ordinance, *or even later,* concerning particular "noise and traffic" problems being associated with adult uses.

Third, noise and traffic are attributes of ***all*** commercial uses. Yet, it is these supposed concerns, *and these concerns alone*, that formed the basis of the appellate court's conclusion that the County was justified in precluding adult uses in all *commercial* zones and relegating them only to *industrial* areas. Consequently then, for example, the In-and-Out Burger drive-thru restaurant located directly across the street from Magnolia's store may stay (irrespective of the noise and traffic it produces), but the First Amendment-protected business of the Plaintiffs must leave. *More importantly, if Magnolia is forced to vacate, there is no rational reason to believe, and certainly there was no evidence tendered by the County supporting the conclusion, that traffic and noise would be in any way reduced in the commercial*

zones by having a non-adult business enterprise take up tenancy on the Premises in place of Magnolia.

It could not have been the intent of this Court in *Renton* to permit any attribute of a *commercial* enterprise *generally* to serve as a basis to restrict speech-related businesses *specifically*, as such a result would permit virtually unrestrained censorship without any hope of ameliorating the secondary effects that emanate from *virtually all* commercial businesses. And, regarding Justice Kennedy's proportionality test, the presumption that "traffic" would be reduced by the Ordinance can only be made by concluding that fewer customers would go to adult businesses which, in-and-of-itself, is a result ***precluded*** by the "how speech would fare" analysis. *See Alameda Books*, 535 U.S. at 449 ("A City may not assert that it will reduce secondary effects by reducing speech in the same proportion") (Kennedy, J., concurring).

IV. THE APPELLATE COURT SETS A DANGEROUS PRECEDENT BY ENCOURAGING A "NIMBY" APPROACH TO ADULT EXPRESSION, THEREBY SETTING THE STAGE FOR THE SUPPRESSION OF DISFAVORED SPEECH.

The Ninth Circuit adopts the NIMBY ("Not In My Backyard") principle in regard to the zoning of adult expression. Specifically, it concludes that "[a]t least where we are dealing with 'unincorporated' areas, it is appropriate to recognize the likely availability of other locations within the same economic

market in neighboring municipalities." App. 14. Consequently, the panel states that "[i]t may *fairly be presumed*" that there are other suitable areas for adult businesses "outside the territory governed by the ordinance in question." *Id.* (emphasis added).

This conclusion sets a dangerous precedent by permitting a governmental entity to assert that even if ***it*** may not have sufficient sites for a particular form of disfavored speech, so long as other locations ***might*** be available nearby, the law is not unduly restrictive. *But cf., Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76-77 (1981) ("One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place").

What makes, however, the Ninth Circuit opinion most ironic in regard to this aspect of its ruling is the following statement: "It may fairly be presumed that most of the ***commercial property*** in the County, ***including property suitable for adult businesses***, is located within municipal boundaries and thus outside the territory governed by the ordinance in question." App. 14 (emphasis added). Consequently, the court ***acknowledges*** that the appropriate location for "adult" uses is in ***commercial*** zones (irrespective of the "noise and traffic" they may cause), even though it upholds the constitutionality of an ordinance that ***precludes*** adult uses in such areas and relegates them only to ***manufacturing*** districts. And, in fact, the City of El Cajon, which is close to Magnolia's store, zones adult establishments into

commercial, and not industrial, districts. *See* El Cajon Municipal Code, http://qcode.us/codes/elcajon, at § 17.90.070(A)(1) and (2).

This broad expansion of the *Renton* standards warrants this petition being granted.

CONCLUSION

For the reasons set forth herein, Petitioners respectfully request that this Honorable Court grant the petition for a writ of certiorari.

Dated: April 2, 2008

Respectfully submitted,

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505 F.3d 935

United States Court of Appeals, Ninth Circuit.
TOLLIS INC.; 1560 N. Magnolia Avenue, LLC, Plaintiffs-Appellants,
v.
COUNTY OF SAN DIEGO, Defendant-Appellee.
No. 05-56300.

Argued and Submitted July 11, 2007.
Submission Withdrawn Aug. 8, 2007.
Resubmitted Oct. 2, 2007.
Filed Oct. 10, 2007.

A. Dale Manicom, San Diego, CA; Bradley J. Shafer, Shafer & Associates, Lansing, MI, for the plaintiffs-appellants.

Thomas D. Bunton and John J. Sansone, County Counsel, San Diego, CA, for the defendant-appellee.

Appeal from the United States District Court for the Southern District of California; Larry A. Burns, District Judge, Presiding. D.C. No. CV-02-02023-LAB/RBB.

Before: BARRY G. SILVERMAN, W. FLETCHER, and RICHARD R. CLIFTON, Circuit Judges.

SILVERMAN, Circuit Judge:

In June 2002, the San Diego County Board of Supervisors adopted a comprehensive zoning ordinance to govern the operation of adult entertainment businesses within its jurisdiction, which covers the unincorporated portions of the county. The ordinance restricts the hours in which such businesses can

operate, requires the removal of doors on peep show booths, and mandates that the businesses disperse to industrial areas of the county. The County's purported rationale for the ordinance was to combat negative secondary effects—crime, disorderly conduct, blight, noise, traffic, property value depreciation, and unsanitary behavior—that concentrate in and around adult businesses.

The two adult entertainment establishments presently operating in the unincorporated portions of San Diego County filed suit. In this appeal, the operators of one of the establishments, Déjà Vu, appeal the district court's decision to uphold the ordinance's dispersal requirements. They also appeal the district court's dismissal of their state law claim under California Government Code § 65860, which requires zoning laws to conform to the municipality's general plan, and the district court's decision to sever a provision of the ordinance setting forth the amount of time in which the County had to approve an operating permit for adult establishments.

We hold that the district court's manner of severance was in error and reverse on that ground. We affirm in all other respects.[1]

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[1] All pending requests for judicial notice are unopposed, and are hereby granted. Municipal ordinances are proper subjects for judicial notice. *See Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1025 n. 2 (9th Cir.2006).

I. Background

In June 2002, citing to concerns about the surrounding neighborhood, the San Diego County Board of Supervisors adopted a comprehensive set of regulations and licensing procedures governing adult entertainment establishments within its jurisdiction. The ordinances took effect the following month.

1560 N. Magnolia Ave., LLC, using property leased from Tollis, Inc., operates an adult bookstore in the Bostonia neighborhood of the county under the name "Déjà Vu." These businesses (hereinafter, "Déjà Vu") initiated federal and state constitutional challenges against the new ordinances, seeking declaratory and injunctive relief.

The district court granted summary judgment to the County, upholding the ordinance's requirement that adult establishments locate only in industrial zones.[2] *See Fantasyland Video, Inc. v. County of San Diego,* 373 F.Supp.2d 1094, 1130-43 (S.D.Cal.2005). The court also dismissed Déjà Vu's state law claim under California Government Code § 65860, regarding conformance to the County's general plan. *Id.* at 1129-30. Finally, the district court held that the County's permitting regime for adult establishments was unconstitutional because it granted the licensing

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[2] The other adult establishment in the unincorporated portion of San Diego County, Fantasyland Video, Inc., has appealed the district court's judgment on other grounds not relevant to the disposition of this appeal.

body an unreasonably long period of time to consider a permit request. *Id.* at 1143-46. The court opted to sever the offending time limits from the ordinance. *Id.* at 1146-47.

This timely appeal followed.

II. Jurisdiction

The district court had subject matter jurisdiction over Déjà Vu's constitutional claims under 28 U.S.C. §§ 1331, 1343(a), and over its state claim under 28 U.S.C. § 1367(a). We have jurisdiction under 28 U.S.C. § 1291.

III. Standard of Review

We review de novo the district court's grant of summary judgment and, viewing the evidence in a light most favorable to the non-moving party, determine whether there are any genuine issues of material fact for trial. *See Gammoh v. City of La Habra,* 395 F.3d 1114, 1122 (9th Cir.2005).

IV. Discussion

A. Industrial Zone Restriction

The constitutionality of the challenged provision is governed by the framework announced in *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). As recounted by *Center for Fair Public Policy v. Maricopa County,* 336

F.3d 1153 (9th Cir.2003), this familiar inquiry proceeds in three distinct steps: First, the ordinance cannot be a complete ban on the protected expression. *Id.* at 1159. Second, the ordinance must be content-neutral or, if content-based with respect to sexual and pornographic speech, its predominate concern must be the secondary effects of such speech in the community. *Id.* at 1159, 1161. Third, the regulation must pass intermediate scrutiny. It must serve a substantial government interest, be narrowly tailored to serve that interest, and allow for reasonable alternative avenues of communication. *Id.* at 1159.

Déjà Vu raises two arguments on appeal both relating to the third step. It first contends that a concurrence by Justice Kennedy in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 444-53, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002), radically altered the traditional *Renton* framework by imposing an additional burden on the County to show "how speech would fare" under the new ordinance.[3] Alternatively, Déjà Vu argues that the ordinance is unconstitutional under the traditional *Renton* framework because all the potential relocation sites are located within the County's industrial zones. We address each in turn.

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[3] Justice Kennedy did not join the plurality opinion in *Alameda Books*. As "his concurrence is the narrowest opinion joining the judgment of the Court," it is the controlling opinion. *Ctr. for Fair Pub. Policy*, 336 F.3d at 1161.

1. Justice Kennedy's Alameda Books Concurrence

To justify a content-based zoning ordinance that restricts sexual and pornographic speech, Justice Kennedy wrote that "a city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact." 535 U.S. at 449, 122 S.Ct. 1728. By adding the last clause, Justice Kennedy said he was expressing an interest in "how speech will fare" after the ordinance is enacted. *Id.* at 450, 122 S.Ct. 1728. The city must have some basis to think that its ordinance will suppress secondary effects, but not also the speech associated with those effects. *Id.* at 449-50, 122 S.Ct. 1728.

In *Alameda Books,* the disputed ordinance prohibited multiple adult businesses from operating under the same roof. Under Justice Kennedy's construct, the City of Los Angeles must have had some basis to assume three propositions: "[1] that this ordinance will cause two businesses to split rather than one to close, [2] that the quantity of speech will be substantially undiminished, and [3] that total secondary effects will be significantly reduced." 535 U.S. at 451, 122 S.Ct. 1728.

The first proposition mirrors the "alternative avenues of communication" requirement under intermediate scrutiny, which requires that the displaced business be given "a reasonable opportunity to

open and operate." *See Renton,* 475 U.S. at 53-54, 106 S.Ct. 925. The third proposition restates the requisite "substantial governmental interest" for regulating adult establishments based on their secondary effects. *See id.* at 50, 106 S.Ct. 925.

But what of the second proposition? Justice Kennedy's reference to whether the "quantity of speech will be [left] substantially undiminished" is shorthand for asking whether the ordinance will impose a significant or material inconvenience on the consumer of the speech. At the time of enactment, the city must have some reasonable basis to believe that interested patrons would, for the most part, be undeterred by the geographic dispersal of the adult establishments. *See Alameda Books,* 535 U.S. at 450, 122 S.Ct. 1728 ("[I]t does not suffice to say that inconvenience will reduce demand and fewer patrons will lead to fewer secondary effects.").

Justice Kennedy then noted that the evidentiary burden to establish these propositions was minimal. *See id.* at 451-52, 122 S.Ct. 1728. He found that the City of Los Angeles had met its initial burden. It had relied on one study and "common experience" to find a correlation between adult establishments and crime, and could reasonably infer that geographic dispersal of the adult establishments would not necessarily decrease the quantity or accessibility of the speech. *Id.* at 452-53, 122 S.Ct. 1728. The burden then shifted to the plaintiffs to disprove the City's assumptions. *Id.* at 453, 122 S.Ct. 1728.

We reach the same conclusion here. The County's legislative record cites to a number of sources—studies and reports from other jurisdictions, relevant judicial decisions, and public testimony—to assert a connection between the adult establishments and negative secondary effects. A municipality may rely on these types of sources. *See Ctr. for Fair Pub. Policy,* 336 F.3d at 1168. The County could then reasonably infer that isolating of adult businesses to industrial zones would have the purpose and effect of reducing crime, disorderly conduct, and property depreciation, as such zones are located away from residential areas and have little other commercial appeal at night. Déjà Vu's attempt to cast doubt on the County's conclusions fails as a matter of law because its expert, Daniel Linz, Ph.D., a professor in the Department of Communication's Law and Society Program at the University of California Santa Barbara, did not rebut the County's evidence with regard to noise and traffic. The evidence presented by Dr. Linz addressed only late night crime and property values. The County considered these factors, but its purported rationale for isolating adult businesses to industrial zones also included combating increased noise and traffic. Déjà Vu's failure to address these considerations is fatal under the second step of the *Renton* intermediate scrutiny analysis. *See Alameda Books, Inc.,* 535 U.S. at 438-39, 122 S.Ct. 1728. With regard to noise and traffic, Déjà Vu failed as a matter of law "to cast direct doubt on [the County's] rationale . . . by demonstrating that the [County's] evidence does not

support its rationale or by furnishing evidence that disputes [its] factual findings." *Id.*

We reject Déjà Vu's contention that *Alameda Books* imposed a heightened evidentiary burden on the County to show "how speech would fare" under the ordinance. So long as there are a sufficient number of suitable relocation sites, the County could reasonably assume that, given the draw of pornographic and sexually explicit speech, willing patrons would not be measurably discouraged by the inconvenience of having to travel to an industrial zone. *See Alameda Books,* 535 U.S. at 452, 122 S.Ct. 1728 (Kennedy, J., concurring in judgment); *see also World Wide Video,* 368 F.3d at 1195 (noting that Justice Kennedy's "how speech will fare" language "[c]onceptually . . . dovetails with the requirement that an ordinance must leave open adequate alternative avenues of communication"). Under this scenario, the quantity and accessibility of the speech would not be substantially diminished.

2. Alternative channels of communication under Renton

To satisfy its burden under *Renton,* the County must propose a sufficient number of potential relocation sites to allow Déjà Vu "a reasonable opportunity" to operate its business. 475 U.S. at 54, 106 S.Ct. 925. For a site to qualify, it "must be considered part of an actual business real estate market for commercial enterprises generally." *Lim v. City of Long Beach,* 217 F.3d 1050, 1054 (9th Cir.2000). If in an industrial or

manufacturing zone, the site must be "reasonably accessible to the general public," "have a proper infrastructure," and be suitable for "some generic commercial enterprise." *Topanga Press, Inc. v. City of Los Angeles,* 989 F.2d 1524, 1531 (9th Cir.1993). Finally, the list must account for other relevant zoning restrictions, such as separation requirements, that might affect a site's availability. *Isbell v. City of San Diego,* 258 F.3d 1108, 1113 (9th Cir.2001).

If the County's list is reasonable, the burden shifts to Déjà Vu to demonstrate that the proposed sites are inadequate or unlikely to ever become available. *Lim,* 217 F.3d at 1055. Once "the relevant market has been properly defined," the factfinder must determine "whether the market contains a sufficient number of potential relocation sites for [p]laintiffs' adult businesses." *Id.* at 1056.

a. Availability of relocation sites

The County proposed 76 potentially available parcels for Déjà Vu's relocation. Déjà Vu submitted the declaration of a land use expert contesting the availability and suitability of each site. After an exhaustive survey, the district court excluded eight sites for summary judgment purposes. *Fantasyland,* 373 F.Supp.2d at 1132-40. In its briefs and at oral argument, Déjà Vu did not contest any of the district

court's individual determinations with respect to these remaining 68 parcels.[4]

Déjà Vu's argument on appeal draws on the County's restriction of adult establishments to industrial zoning districts. All adult establishments must relocate to four industrial districts: M50, M52, M54, and M58. Although presumably available for adult establishments, none of these zones allows for general commercial use. "Non-manufacturing uses are restricted to those providing essential support services to manufacturing plants and their personnel." San Diego County Zoning Ordinance § 2500; *see also* §§ 2520, 2540, 2580. According to Déjà Vu, this total exclusion from commercial zones suggests that it has not "been afforded a reasonable opportunity to relocate." *See Topanga Press,* 989 F.3d at 1531 n. 5 (avoiding the question of whether "under *Renton,* a business has been afforded a reasonable opportunity to relocate if all relocation sites are within an industrial zone and no commercial zones are offered.").

We disagree. Déjà Vu's position confuses two distinct questions. Whether or not an industrial zone *permits* generic commercial business within its borders rests on a legislative policy judgment. Asking whether an industrial zone *is suitable for* generic commercial activity examines the physical characteristics and infrastructure of the land within the zone.

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[4] We therefore express no opinion on the district court's mode of analysis, nor on any of its conclusions.

The *Topanga Press* analysis is concerned only with the latter. *See* 989 F.3d at 1531; *see also Diamond v. City of Taft,* 215 F.3d 1052, 1056 (9th Cir.2000). In *Topanga Press,* we held that manufacturing or industrial zones may comprise part of the relevant market if they "are reasonably accessible to the general public" and "have a proper infra-structure." 989 F.3d at 1531. We did not hold that industrial sites are potentially available for relocations only so long as they may be used for commercial purposes generally. If an industrial site is reasonably accessible and has sufficient infrastructure to be "available" under *Topanga,* it remains available even if its use for other commercial purposes may be restricted by the zoning law.

In any case, the ordinance at issue here requires that adult businesses be located within industrial zones. Any other interpretation of the zoning scheme would zone adult businesses out of the county. As Déjà Vu does not challenge any of the district court's holdings with respect to the suitability of any one of the 68 parcels for generic commercial use, its argument fails.

b. Sufficiency of alternative sites

The district court determined that the remaining 68 sites, on which eight to 10 adult entertainment businesses could operate simultaneously, were sufficient to allow Déj à Vu—the only affected adult entertainment business in the county—an opportunity to

relocate. *Fantasyland,* 373 F.Supp.2d at 1140-43. Déjà Vu does not challenge this holding, but argues that the district court should have relied on other secondary measurements to assess sufficiency.

We agree that measuring whether the number of proposed sites is sufficient to meet existing demand for sexual or pornographic speech is one of several tools to assess whether a municipality has afforded an adult business a reasonable opportunity to conduct their trade. *See Young v. City of Simi Valley,* 216 F.3d 807, 822 (9th Cir.2000). Nevertheless, we cannot identify any error in the district court's other calculations to justify reversal.

Déjà Vu contends that the percentage of available acreage theoretically available to adult businesses in unincorporated San Diego County is drastically less than the amount approved in *Renton. See* 475 U.S. at 53, 106 S.Ct. 925. Furthermore, it asserts that the ratio of potential adult business sites to population in San Diego County is much lower than in *Renton* and eight Florida municipalities engaged in similar litigation. Yet, Déjà Vu offers no argument or evidence showing that these communities are comparable to unincorporated San Diego County in size, population, or demographics. Absent such a connection, its calculations are meaningless.

It also must be borne in mind that the City of San Diego and the other incorporated municipalities in the county are not governed by this ordinance. The unincorporated portions of the county take up the

substantial majority of the land area but only a small fraction of the population of the county as a whole. It may fairly be presumed that most of the commercial property in the county, including property suitable for adult businesses, is located within municipal boundaries and thus outside the territory governed by the ordinance in question. At least where we are dealing with "unincorporated" areas, it is appropriate to recognize the likely availability of other locations within the same economic market in neighboring municipalities.

B. Violation of County's General Plan

Déjà Vu also claims the zoning ordinance violates California Government Code § 65860, which requires that "zoning ordinances . . . be consistent with the general plan of the county." The district court granted the County's motion for summary judgment because Déjà Vu failed to raise the claim in its complaint. *Fantasyland,* 373 F.Supp.2d at 1129.

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a). The plaintiff need not detail all the supporting facts. The statement need only "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

On appeal, Déjà Vu refers to its allegation that "the legislative record [fails to] establish that this

statute significantly advances any 'important' governmental interest." The state law claim is purportedly encompassed within this statement.

Déjà Vu's argument is not persuasive. The above allegation was made in support of the following proposition:

> Defendant's Zoning Amendment violates Plaintiffs' and the public's right to freedom of speech, press and expression protected under the First and Fourteenth Amendments to the United States Constitution and Article I, § 2 of the California Constitution. . . .

There is no accompanying reference to the relevant state statute and no assertion of a conflict between the ordinance and the County's General Plan. As a result, the County did not have fair notice that Déjà Vu was asserting a claim under California Government Code § 65860. The district court's grant of summary judgment on this issue was therefore correct.

C. District Court Severance of Unconstitutional Time Restraints

Under San Diego County Ordinance § 6930(b), any person seeking to operate, enlarge, or transfer control of an adult establishment must first obtain a permit from the County. The district court found that the County's permitting regime was unconstitutional because it granted the licensing body an unreasonably long period of time—130 or 140 days depending

on the calculation method—to consider a permit request. *Fantasyland,* 373 F.Supp.2d at 1143-46. The court then severed the offending time limits from the ordinance. *Id.* at 1146-47. Déjà Vu now challenges the district court's manner of severance.

We hold that the district court's manner of severance was erroneous. Once the offending provision is removed, the text of the ordinance contains no time limits at all. A licensing requirement for protected expression is patently unconstitutional if it imposes no time limits on the licensing body. *See FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 228, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) ("[T]he licensor must make the decision whether to issue the license within a *specified* and reasonable time period during which the status quo is maintained. . . .") (emphasis added). A severance is inappropriate if the remainder of the statute would still be unconstitutional. *See Planned Parenthood of Idaho, Inc. v. Wasden,* 376 F.3d 908, 935 (9th Cir.2004).

This conclusion does not require, as Déjà Vu contends, invalidation of the entire ordinance. The district court should have instead severed all provisions of § 6930(b) setting forth the permit requirement because they were not moored to a reasonable time limit, thereby leaving the ordinance's other provisions intact. Owners of adult establishments would have to comply with the substantive provisions of the ordinance, but would not need to secure a permit prior to operation unless and until the time limit defect is corrected. We therefore remand to the

district court to correct its severance order consistent with this opinion. Each party should bear its own costs.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

373 F.Supp.2d 1094

United States District Court, S.D. California.
FANTASYLAND VIDEO, INC., Plaintiff,
v.
COUNTY OF **SAN DIEGO**, Defendant.
Tollis, Inc. and 1560 N. Magnolia Ave., LLC, Plaintiffs,
v.
County of **San Diego**, Defendant.
Nos. CIV. 02CV1909-LABRBB, CIV. 02CV2023-LABRBB.

June 14, 2005.

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ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' JOINT MOTION FOR SUMMARY JUDGMENT; ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT; INJUNCTION; and ORDER TO SHOW CAUSE

BURNS, District Judge.

In their respective complaints, plaintiffs allege certain amendments to San Diego County ordinances regulating adult entertainment businesses violate their rights under the federal and California constitutions. Before the Court are plaintiffs' Joint Motion for Summary Judgment and defendant's Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment. The parties also filed opposing and reply papers, as well as a joint statement of undisputed facts, almost 2,000 pages of legislative record, and over 700 pages of declarations and exhibits. Defendant also filed evidentiary objections.[1] Although the parties requested oral argument, the Court finds the issues in both motions appropriate for decision on the papers and without oral argument pursuant to Civil Local Rule 7.1(d)(1). For the reasons discussed below, plaintiffs' Joint Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART**, and defendant's Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment is **GRANTED IN PART AND DENIED IN PART**. As specified more fully below, the Court finds unconstitutional certain procedural provisions of the ordinance amendments pertaining to licensing and zoning regulations.

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[1] To the extent the objections are not addressed below, they are overruled.

Background

In June 2002, the San Diego County Board of Supervisors passed Local Ordinance No. 9469, entitled "An Ordinance Amending the San Diego County Zoning Ordinance Relating to Adult Entertainment Establishments;" and Local Ordinance No. 9479, entitled "An Ordinance Amending the San Diego County Code of Regulatory Ordinances Relating to the Licensing and Regulation of Adult Entertainment Establishments." (Legislative Record ("LR"), at 15-32, 139-75.) Both of these ordinances were effective in July 2002.

Plaintiffs filed two separate complaints against San Diego County ("County") which have been consolidated. (Order filed Aug. 5, 2004, at 2, 5.) Plaintiff Tollis, Inc. owns property at 1560 N. Magnolia Avenue in the Pepper Drive/Bostonia area of San Diego County, which it leases to plaintiff 1560 N. Magnolia Ave., LLC. At this location, plaintiff 1560 N. Magnolia Ave., LLC operates a business called Deja Vu, which sells sexually explicit books, magazines, and novelties. Deja Vu also wants to offer live nude dancing at this location. It acquired its present location before the amendments went into effect, after obtaining the operating permit, and on the contingency it could offer nude entertainment. Hereafter, these plaintiffs will be referred to collectively as Deja Vu. Plaintiff Fantasyland Video, Inc. ("Fantasyland") operates a business at 1157 Sweetwater Road in the Spring Valley area of San Diego County, which includes an "Adult Arcade/Peep Show," an "Adult Bookstore," an

"Adult Novelty Store," and an "Adult Video Store." (Jt. Stmnt of Facts, 4.)

In their complaints, plaintiffs seek a declaration the amendments to local ordinances which affect either the location or the activities conducted by their businesses violate their right to free speech provisions of the First Amendment. In addition, they seek an injunction prohibiting the enforcement of the amendments against them. Deja Vu also argues the amendments violate the California Constitution, and seeks damages arising out of the County's threat to enforce the amendments.

Although they filed a Joint Motion for Summary Judgment, each of the plaintiffs challenges only those portions of the amendments affecting their particular businesses. Plaintiffs' Joint Motion seeks summary judgment "in the form of an order enjoining the County from enforcing" the ordinances as amended because they are unconstitutional. The County's Motion seeks summary judgment in its favor on the ground all amendments to the ordinances are constitutional and enforceable against plaintiffs.

Discussion

I. Summary Judgment Standards

Federal Rule of Civil Procedure 56(c) empowers the court to enter summary judgment on factually unsupported claims or defenses, and thereby "secure the just, speedy and inexpensive determination of

every action." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 327, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Arpin v. Santa Clara Valley Transp. Agency,* 261 F.3d 912, 919 (9th Cir.2001). The moving party bears the initial burden of demonstrating the absence of a "genuine issue of material fact for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A fact is material if it could affect the outcome of the suit under the governing substantive law. *Id.* at 248, 106 S.Ct. 2505. A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Id.*

"When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case. Once the moving party comes forward with sufficient evidence, the burden then moves to the opposing party, who must present significant probative evidence tending to support its claim or defense." *C.A.R. Transp. Brokerage Co., Inc. v. Darden Restaurants,*

Inc., 213 F.3d 474, 480 (9th Cir.2000) (citations omitted).

In contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out the absence of evidence from the nonmoving party. The moving party need not disprove the other party's case. *See Celotex,* 477 U.S. at 325, 106 S.Ct. 2548; *see also Garneau v. City of Seattle,* 147 F.3d 802, 807 (9th Cir.1998).

If the movant meets his burden, the burden shifts to the nonmovant to show summary adjudication is not appropriate. *Celotex,* 477 U.S. at 317, 324, 106 S.Ct. 2548. The nonmovant does not meet this burden by showing "some metaphysical doubt as to material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The "mere scintilla of evidence in support of the nonmoving party's position is not sufficient." *Anderson,* 477 U.S. at 252, 106 S.Ct. 2505. Accordingly, the nonmoving party cannot oppose a properly supported summary adjudication motion by "rest[ing] on mere allegations or denials in his pleadings." *Id.* at 256, 106 S.Ct. 2505. The nonmovant must go beyond the pleadings to designate specific facts showing there are genuine factual issues which "can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250, 106 S.Ct. 2505.

In considering the motion, the nonmovant's evidence is to be believed and all justifiable inferences are to be drawn in his favor. *Anderson,* 477 U.S. at 255, 106 S.Ct. 2505. Determinations regarding credibility, the weighing of evidence, and the drawing of legitimate inferences are jury functions, and are not appropriate for resolution by the court on a summary judgment motion. *Id.*

In this case, the parties filed cross-motions regarding some of the same causes of action. As discussed below, the County bears the burden of proof at trial with respect to some issues raised by the cross-motions; with respect to other issues, the burden is on plaintiffs. The mere fact the parties filed cross-motions "does not necessarily mean there are no disputed issues of material fact and does not necessarily permit the judge to render judgment in favor of one side or the other." *Starsky v. Williams,* 512 F.2d 109, 112 (9th Cir.1975). "[E]ach motion must be considered on its own merits." *Fair Hous. Council of Riverside County, Inc. v. Riverside Two,* 249 F.3d 1132, 1136 (9th Cir.2001).

When proper grounds for granting summary judgment have not been established, "[s]ummary adjudication may be appropriate on clearly defined, distinct issues." *FMC Corp. v. Vendo Co.,* 196 F.Supp.2d 1023, 1029 (E.D.Cal.2002) (citing *Robi v. Five Platters, Inc.,* 918 F.2d 1439 (9th Cir.1990)). "An order under Rule 56(d) narrows the issues and enables the parties to recognize more fully their rights, yet it permits the court to retain full power to

completely adjudicate all aspects of the case when the proper time arrives." *FMC Corp.*, 196 F.Supp.2d at 1029-30 (citing 10B Wright & Miller, Federal Practice and Procedure (3d ed.1998), § 2737 at 316-18). Specifically, Rule 56(d) empowers the court to "ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted" and to "mak[e] an order specifying the facts that appear without substantial controversy, and direct[ ] such further proceedings in the action as are just."

II. Summary of Applicable First Amendment Principles and Burdens of Proof

The parties dispute the legal standard and burdens of proof applicable to time, place, and manner restrictions regulating adult entertainment businesses after *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002). Since this standard applies to many issues raised by the cross-motions, the Court addresses it in detail below.

The general rule is "[l]aws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles." *United States v. Playboy Entm't Group*, 529 U.S. 803, 812, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000). "In general, where a plaintiff claims suppression of speech under the First Amendment, the plaintiff bears the initial burden of proving that speech

was restricted by the governmental action in question." *Lim v. City of Long Beach,* 217 F.3d 1050, 1054 n. 4 (9th Cir.2000). It is beyond question sexually-oriented speech enjoys some protection under the free speech provisions of the First Amendment. *Playboy,* 529 U.S. at 812-17, 120 S.Ct. 1878. Although neither party expressly discusses the issue whether the County's amendments restrict protected speech; the undisputed underlying premise of their motions is that they do.

"The burden then shifts to the defendant governmental entity to prove that the restriction in question is constitutional." *Lim,* 217 F.3d at 1054 n. 4. The government cannot ban sexually-oriented speech altogether but can place restrictions on it so long as the restrictions satisfy one of two standards. The purpose or justification behind the law in question is the key to determining which of the two standards applies.

If the law is designed to have a direct impact by restricting speech because of the content of the speech and because of the effect the speech may have on its listeners, the law is referred to as a content-based restriction, and the government bears an especially heavy burden to overcome a First Amendment challenge. *Playboy,* 529 U.S. at 812-17, 120 S.Ct. 1878. A content-based speech restriction can survive a First Amendment challenge only if "it satisfies strict scrutiny," which requires the government not only to identify and establish a compelling interest but also

to explain why a less restrictive provision would not be as effective. *Id.* at 813, 817, 120 S.Ct. 1878.

On the other hand, if the law is content-neutral, and its restrictions on sexually-oriented speech are primarily justified not by the concern for the effect of the subject matter on listeners, but by reducing negative secondary effects associated with the speech, it is subject to the intermediate level of scrutiny, which is highly deferential to the government. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-49, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). The parties in this case do not dispute the intermediate scrutiny, rather than strict scrutiny, applies.

Content-neutral time, place, and manner restrictions are constitutional under intermediate scrutiny even if they restrain speech, so long as they meet three requirements. First, the restriction must be "content-neutral." This means the restriction can be justified without reference to the content of the speech. A restriction can be justified without reference to the content of the speech if the "predominate intent" behind the restriction is not to suppress the speech but to "serve a substantial government interest," such as preventing crime or combating "the undesirable secondary effects" of businesses which "purvey sexually explicit materials." *Renton,* 475 U.S. at 48-49, 106 S.Ct. 925. If so justified, restrictions which specifically target or treat adult businesses differently from other types of businesses can be content-neural. *Id.* at 47-48, 106 S.Ct. 925.

Second, the restriction must be "narrowly tailored" to "serve a substantial government interest." *Renton,* 475 U.S. at 50-52, 106 S.Ct. 925. In *Renton,* for example, a zoning ordinance, which required adult movie theaters to be located at least 1,000 feet from residential zones, churches, parks, and schools, was held narrowly tailored and constitutional. *Id.* at 43, 106 S.Ct. 925. The ordinance was considered "narrowly tailored" because it did not apply to all theaters but was designed "to affect only that category of theaters shown to produce the unwanted secondary effects." *Id.* at 52, 106 S.Ct. 925. And this form of selectivity is constitutionally permissible; a time, place, and manner restriction affecting protected speech can be "under-inclusive." *Id.* In other words, the government does not have to attempt to address all of its interests at one time. *Id.* at 52-53, 106 S.Ct. 925. The location restriction in *Renton* only applied to adult theaters and not to other types of adult businesses. This was and is permissible because the government "must be allowed a reasonable opportunity to experiment with solutions" and can, for example, choose to single out and place limitations on "one particular kind of adult business." *Id.* (internal quotation marks and citation omitted). Furthermore, the government has broad discretion in selecting a method "to further its substantial interests." *Id.* at 52, 106 S.Ct. 925. It may, for example, "regulate adult theaters by dispersing them" or "by effectively concentrating them" in the same area. *Id.*

Third, the restriction must allow "for reasonable alternative avenues of communication." *Renton,* 475 U.S. at 50, 52, 106 S.Ct. 925. The "overriding concern is that a city cannot 'effectively deny adult businesses a reasonable opportunity to open and operate within the city.'" *Diamond v. City of Taft,* 215 F.3d 1052, 1056 (9th Cir.2000) (quoting *Renton,* 475 U.S. at 54, 106 S.Ct. 925) (internal alterations omitted). An adult business is given a reasonable opportunity to relocate, if the potential relocation sites "may be considered part of an actual business real estate market," and if "there are an adequate number of potential relocation sites for already existing businesses." *Topanga Press, Inc. v. City of Los Angeles,* 989 F.2d 1524, 1530 (9th Cir.1993). "That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation." *Renton,* 475 U.S. at 54, 106 S.Ct. 925.

Although the burden of proof with respect to these requirements is on the government, the burden is not difficult to meet. *See, e.g., World Wide Video, Inc. v. City of Spokane,* 368 F.3d 1186, 1196 (9th Cir.2004), 2004 U.S.App.Lexis 10443, 2005 WL 1429810, 2004 U.S.App. LEXIS 14381 and 2005 WL 1429810, 2004 U.S.App. LEXIS 18927 (referring to the standard set forth in *Renton* and *Alameda Books* as "very little evidence standard"). The government is not required to meet "an unnecessarily rigid burden of proof" to justify the restriction and may rely on general experiences, findings, and studies completed

by other local governments, including those reflected in judicial opinions:

> [The government] was entitled to rely on the experiences of . . . other cities, and in particular on the "detailed findings" summarized in [a judicial] opinion, in enacting its adult theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

Renton, 475 U.S. at 50, 51-52, 106 S.Ct. 925: *see also City of Erie v. Pap's A.M.*, 529 U.S. 277, 296-97, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (reliance on judicial opinions discussing secondary effects of similar activities or establishments is reasonable).

Plaintiffs believe the highly deferential standard set forth in *Renton* was modified in their favor by *Alameda Books.* They argue the government is no longer entitled to the "extreme deference" articulated in *Renton.*

Plaintiffs' argument is based on a misreading of Justice Kennedy's concurring opinion in *Alameda Books.* Although Justice Kennedy's concurrence "may be regarded as the controlling opinion," because there was no majority opinion, it did not work a fundamental shift in the *Renton* analysis. *See Ctr. for Fair Pub. Policy v. Maricopa County,* 336 F.3d 1153, 1161-62

(9th Cir.2003) (citing *Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.")). Justice Kennedy disavowed any interpretation which would fundamentally change the *Renton* standard. *Alameda Books,* 535 U.S. at 448, 122 S.Ct. 1728 (Kennedy, J., concurring) ("the central holding of *Renton* is sound"). He agreed with the plurality laws "designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny." *Id.* The plurality considered his opinion "simply a reformulation of the requirement that an ordinance warrants intermediate scrutiny only if it is a time, place, and manner regulation and not a ban." *Id.* at 443, 122 S.Ct. 1728. Accordingly, Justice Kennedy's concurring opinion was not "meant to precipitate a sea change in this particular comer of First Amendment law," as suggested by plaintiffs. *See Ctr. for Fair Pub. Policy,* 336 F.3d at 1162.

In *Alameda Books,* the Supreme Court granted *certiorari* to "clarify the standard for determining whether an ordinance serves a substantial government interest under *Renton.*" *Alameda Books,* 535 U.S. at 433, 122 S.Ct. 1728. The plurality opinion noted the *Renton* standard is not intended to mean a government "can get away with shoddy data or reasoning." *Id.* at 438, 122 S.Ct. 1728. The focus of many

of plaintiffs' arguments in this case is the reference to "shoddy data" —they argue the reports and other evidence relied on by the County in amending its ordinances are "shoddy" and do not support the County's rationale for the new restrictions on their businesses. In addition, *Alameda Books* set forth a shifting burden of proof:

> The [government's] evidence must fairly support the [government's] rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the [government's] evidence does not support its rationale or by furnishing evidence that disputes the [government's] factual findings, the [government] meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a [government's] rationale in either manner, the burden shifts back to the [government] to supplement the record with evidence renewing support for a theory that justifies its ordinance.

Id. at 438-39, 122 S.Ct. 1728. In this regard, plaintiffs argue their evidence is at the very least sufficient to "cast direct doubt" on the County's rationale for the amendments, thereby shifting the burden to the County to supplement the record.

Plaintiffs interpretation of *Alameda Books* as raising the government's evidentiary bar is unsupported by its holding, and was expressly rejected by the plurality and Justice Kennedy's concurrence, which noted "very little evidence is required" for the

government to meet its burden. *Alameda Books,* 535 U.S. at 451, 122 S.Ct. 1728. Given the low level of evidence required for the government to properly support a content-neutral ordinance, and the high level of deference it is afforded, the plaintiff's burden to "cast direct doubt" on the government's rationale is very high. *See World Wide Video,* 368 F.3d at 1195-96; *Ctr. for Fair Pub. Policy,* 336 F.3d at 1168.

III. Hours-of-Operation Restriction

A. The First Amendment Claim

In their respective operative complaints, all plaintiffs challenge on First Amendment grounds the new hours-of-operation restriction, which states as follows:

> It shall be unlawful for any owner, operator, manager or employee of an adult entertainment establishment to allow such establishment to remain open for business between the hours of 2:00 a.m. and 6:00 a.m. of any day excepting herefrom an adult hotel/motel.

(LR, at 154 [Ordinance No. 9479, § 21.1809].) The County moves for summary judgment on plaintiffs' hours-of-operation claim, and all plaintiffs cross-move for summary judgment on this claim.

It is undisputed intermediate scrutiny applies to the hours-of-operation provision. Accordingly,

> [t]he familiar three-part analytical framework established in *Renton* applies. First, we

> must determine whether the regulation is a complete ban on protected expression. Second, we must determine whether the county's purpose in enacting the provision is the amelioration of secondary effects. If so, it is subject to intermediate scrutiny, and we must ask whether the provision is designed to serve a substantial government interest, and whether reasonable alternative avenues of communication remain available.

Dream Palace v. County of Maricopa, 384 F.3d 990, 1013 (9th Cir.2004) (internal citations omitted). Plaintiffs do not dispute the hours-of-operation restriction is content-neutral. Instead, they challenge whether the concerns the County aims to address constitute a substantial government interest, and whether the restriction leaves open reasonable alternative avenues of communication. Plaintiffs contend the County's evidence is insufficient to demonstrate a connection between the new provision and amelioration of negative secondary effects of adult entertainment businesses.

The County maintains the hours-of-operation restriction was intended to reduce negative secondary effects of excessive noise, traffic, disorderly conduct and crime during late night hours. In enacting the restriction, the County relied on evidence including twenty-eight studies from other jurisdictions regarding secondary effects of adult entertainment businesses, such as prostitution, public sexual activity, noise and unclean conditions (LR, at 443-1718, 1752-1833); experiences of other municipalities as reported

in several judicial opinions (LR, at 6-17, 141-42, 1719-47); and local public testimony by fifteen witnesses (LR, at 1906 *et seq.*).[2] This record "compares favorably to the record found to pass muster" in *Center for Fair Public Policy and Dream Palace. See Dream Palace,* 384 F.3d at 1015. The type of evidence considered by the County has been held "reasonable and relevant" in other cases. *Id.* (quoting *Ctr. for Fair Public Policy,* 336 F.3d at 1168).

Furthermore, the County argues *Center for Fair Public Policy* bars plaintiffs' claim as a matter of law because it rejected a First Amendment challenge to a similar hours-of-operation restriction. Although *Center for Fair Public Policy* established a general proposition hours-of-operation restrictions may pass muster under the First Amendment, this does not relieve the Court of the duty to put the County to its proof in this case. *See Dream Palace,* 384 F.3d at 1012.

Plaintiffs do not contend the County failed to satisfy its initial burden of producing evidence which fairly supports the amendments. Instead, they argue their contrary evidence "cast[s] ample doubt on the County's proffered justification for its legislation," shifts the burden to the County to supplement the

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[2] The County also indicated a willingness to supply the Court with additional studies and expert declarations, if the Court finds plaintiffs cast direct doubt on the County's rationale. (Def.'s Opp'n, at 7.)

record with further justification, and raises a genuine issue of material fact sufficient to preclude summary judgment for the County. (Pls.' Joint Mot., at 1-3.) By presenting their own evidence, plaintiffs attempt to distinguish this case from *Center for Fair Public Policy.*

Specifically, plaintiffs mount a two-pronged attack on the County's evidence. First, they attempt to demonstrate the County's evidence does not support its rationale by pointing to the testimony of the County's own expert, Dr. Richard McCleary. *See Alameda Books,* 535 U.S. at 441, 122 S.Ct. 1728 (plurality opinion). Second, plaintiffs furnish evidence, a report and empirical studies of their expert Dr. Daniel Linz, which they contend disputes the County's evidence. *See id.* As discussed below, neither prong is sufficient as a matter of law to cast direct doubt on the County's evidence, raise a genuine issue of material fact in opposition to the County's summary judgment motion, or meet plaintiffs' burden as the moving parties on their own cross-motion.

Dr. McCleary testified "late-night crime is independent of adult entertainment businesses and rather derives from alcoholic beverage establishments and their patrons." (Pls.' Joint Reply, at 2.) Plaintiffs argue Dr. McCleary conceded there is no connection between late night crime and adult entertainment businesses or their patrons. (*Id.*) The Court has reviewed the entirety of Dr. McCleary's testimony submitted by both sides (Bunton Reply Decl., Ex. 18; Manicom Opp'n Decl., Ex. 3), and finds it does not

support plaintiffs' argument. Furthermore, in the context of all the secondary effects the County sought to address, plaintiffs' argument, even if believed, is insufficient as a matter of law.

Dr. McCleary testified there would still be an increase in crime "independent of any adult businesses" and even if all businesses were closed from 2:00 a.m. to 6:00 a.m. because "[c]riminals often operate during late night, early morning hours when witnesses and police are less likely to be present." (Bunton Reply Decl., Ex. 18, at 46-47.) However, he also testified businesses open between 2:00 a.m. and 6:00 a.m. are a "focus point for noise" because bar patrons tend to look for another place to go after the bars close at 1:00 a.m., and bar patrons who have consumed alcoholic beverages have been known to congregate outside adult businesses, resulting in noise complaints. (*Id.* at 33-34.) He indicated the hours restriction is justifiable because police resources are very strained during these hours, which results in added risks to public safety. (*Id.* at 41 *et seq.*) Furthermore, if fewer people are "out and about" during the late night hours because businesses are closed, it will be more difficult for "predatory criminals" to find victims, resulting in a reduction in crime. (*Id.* at 46-47.)

Even if the Court accepted plaintiffs' interpretation of Dr. McCleary's testimony to suggest late night crime is independent of adult entertainment businesses, it is insufficient to cast direct doubt on the County's evidence. To raise a genuine issue of material fact on

summary judgment, a fact is material if it could affect the outcome of the suit under the governing substantive law. *Anderson,* 477 U.S. at 248, 106 S.Ct. 2505. Under Ninth Circuit law interpreting and applying the burden-shifting standard articulated in *Alameda Books,* plaintiffs must effectively controvert much, if not all, of the County's evidence, leaving less than "some evidence" on which the County could reasonably rely for the ordinance. *World Wide Video,* 368 F.3d at 1195-96 (affirming order granting the government's motion for summary judgment). As in *World Wide Video,* plaintiffs' argument here does not effectively controvert much of the County's evidence because the County relied on a voluminous legislative record, including numerous studies conducted by other municipalities, judicial opinions discussing similar secondary effects and public testimony, which plaintiffs do not address. Furthermore, plaintiffs' argument is targeted only toward evidentiary support addressing late night crime, and does not address the other targeted secondary effects such as late night noise, traffic and disorderly conduct. The County only needs "some evidence" to support its ordinance. *Id.* Accordingly, plaintiffs' first argument fails as a matter of law to cast direct doubt on the County's evidence.

Plaintiffs' second argument is based on Dr. Linz' report. Dr. Linz opined the reports cited by the County on the negative secondary effects of sexually-oriented businesses are unreliable because their methodology and empirical assumptions are flawed.

He participated in a number of other relevant studies, which he claims do not suffer from "methodological flaws," and show sexually-oriented businesses are not causally related to crime. (Linz Decl., at 9.) In addition, Dr. Linz conducted "an empirical study" which examined "whether there is a greater incidence of crime in the vicinity of peep show establishments than in comparable control areas, and whether any secondary crime effects of peep show establishments in San Diego are disproportionately greater between the hours of 2 a.m. and 6 a.m." (*Id.* at 11.) He also completed "an empirical study of criminal activity surrounding adult businesses in San Diego County." (*Id.* at 12.) Based on his own studies, Dr. Linz opined there is "no evidence that the adult businesses examined in the study are associated in any way with the clustering of crimes against persons. . . ." (*Id.*)

Plaintiffs point out Dr. Linz' approach was accepted by other courts in cases involving successful challenges to municipal ordinances. *See Ramos v. Town of Vernon,* 353 F.3d 171 (2nd Cir.2003); *Hodgkins v. Peterson,* 2004 U.S. Dist. LEXIS 16359 (S.D.Ind.); *J.L. Spoons, Inc. v. Morckel,* 314 F.Supp.2d 746 (N.D.Ohio 2004). These cases, however, are distinguishable. *Ramos* and *Hodgkins* did not involve adult entertainment businesses. They addressed juvenile curfew ordinances, and were analyzed under a different legal standard. *Ramos,* 353 F.3d at 176-84 (applying equal protection intermediate scrutiny to a curfew restriction on to minors' right to intrastate travel); *Hodgkins,* 2004 U.S. Dist. LEXIS 16359 (applying strict

scrutiny to parental rights issue). Although *J.L. Spoons* involved an adult entertainment ordinance, the plaintiffs presented a facial overbreadth challenge, and the court did not apply *Alameda Books* but *Triplett Grille v. City of Akron,* 40 F.3d 129, 132 (6th Cir.1994). None of these cases is therefore helpful in analyzing whether plaintiffs cast direct doubt on the County's evidence following *Alameda Books.*

On the other hand, Dr. Linz' approach was unsuccessful in pertinent cases. *See Pap's,* 529 U.S. at 300, 120 S.Ct. 1382; *Alameda Books,* 535 U.S. at 439, 122 S.Ct. 1728 (plurality opinion); *Nite Moves Entm't. Inc. v. City of Boise,* 153 F.Supp.2d 1198, 1208-09 (D.Idaho 2001). In *Pap's, amicus curiae* relied on Dr. Linz' study, and apparently suggested when secondary effects are amenable to empirical treatment, the government's non-empirical evidence should be discounted, and an empirical analysis should be required. 529 U.S. at 314-15 n. 3, 120 S.Ct. 1382 (Souter, J., dissenting). The majority opinion rejected this idea. *Id.* at 300, 120 S.Ct. 1382. As in this case, in *Alameda Books, amicus curiae* criticized the studies relied upon by the City of Los Angeles. 535 U.S. at 453-54 n. 1, 122 S.Ct. 1728 (Souter, J., dissenting). Again, the plurality rejected the idea and noted the governments have never been required to demonstrate with empirical data their ordinances will successfully lower crime. *Id.* at 439, 122 S.Ct. 1728.

Plaintiffs' argument is similar to the one considered and rejected by the Seventh Circuit in *G.M.*

Enterprises v. Town of St. Joseph, 350 F.3d 631 (7th Cir.2003). Along with other evidence contrary to the government's position, those challenging the ordinance submitted a study and declaration by Dr. Linz that attacked the methodology employed in the studies relied upon by the government. *Id.* at 635-36. The Seventh Circuit concluded this was just "some evidence that might arguably undermine the [government's] inference of the correlation of adult entertainment and adverse secondary effects. . . ." *Id.* at 639. It concluded "some evidence" was not enough:

> Although this evidence shows that the [government] might have reached a different and equally reasonable conclusion regarding the relationship between adverse secondary effects and sexually oriented businesses, it is not sufficient to vitiate the result reached in the [government's] legislative process. [¶] *Alameda Books* does not require a court to re-weigh the evidence considered by a legislative body, nor does it empower a court to substitute its judgment in regards to whether a regulation will best serve a community, so long as the regulatory body has satisfied the *Renton* requirement that it consider evidence "reasonably believed to be relevant to the problem" addressed.

Id. at 639-40 (quoting *Renton,* 475 U.S. at 51-52, 106 S.Ct. 925); *see also Alameda Books,* 535 U.S. at 440, 122 S.Ct. 1728 (plurality opinion) (acknowledging the local legislative body "is in a better position than the Judiciary to gather and evaluate data on local

problems"), 445 (Kennedy, J., concurring) ("as a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners. . . . [t]he [local legislative body] knows the streets of [the city] better than we do").

The Seventh Circuit's analysis in *G.M. Enterprises* is consistent with the Ninth Circuit's analysis in *World Wide Video*. As discussed above, to successfully cast direct doubt on the County's evidence, plaintiffs bear a heavy burden of effectively rebutting more than just some of the categories of permissible evidence relied upon by the County with respect to each targeted secondary effects. *See World Wide Video*, 368 F.3d at 1195-96. So long as some evidence remains upon which the County reasonably relied, plaintiffs fail to cast direct doubt. *See id.* Although Dr. Linz' study and opinion purport to contradict some of the County's secondary effect evidence, plaintiffs' argument in this regard suffers from some of the same fatal infirmities as their first argument based on Dr. McCleary's testimony. It addresses only the reports from other municipalities, but does not address the judicial opinions and public testimony which the County also considered. In addition, it is directed only toward late night crime, and does not address the remaining secondary effects the County targeted.

As plaintiffs' evidence is insufficient as a matter of law to cast direct doubt on the County's evidence, plaintiffs fall short of meeting their burden to raise a genuine issue of material fact in opposition to the

County's summary judgment motion with respect to the new hours-of-operation restriction. *A fortiori,* plaintiffs also fail to meet their burden as the moving parties on their cross-motion. Therefore, the County's motion for summary judgment of this issue is granted, and plaintiff's cross-motion is denied.

B. The California Constitution Claim

Plaintiffs move for summary judgment of their hours-of-operation restriction claim to the extent it is based on the California Constitution, and the County counters on the same claim. Relying on the California Supreme Court's decision in *People v. Glaze,* 27 Cal.3d 841, 166 Cal.Rptr. 859, 614 P.2d 291 (1980), plaintiffs argue the new hours-of-operation restriction violates Article I, Section 2, of the California Constitution. The County argues the pertinent portion of *Glaze* is no longer good law, and the ordinance at issue therein is distinguishable in several material respects. A review of the cases cited by the parties reveals the County is correct.

In *People v. Glaze,* the California Supreme Court held invalid under the California Constitution an ordinance which required picture arcades to be closed between 2:00 a.m. and 9:00 a.m. 27 Cal.3d at 843-44, 849, 166 Cal.Rptr. 859, 614 P.2d 291 (1980). The purpose of the hours-of-operation restriction was to "prevent masturbation during those hours when law enforcement problems are greatest." *Id.* at 847, 166 Cal.Rptr. 859, 614 P.2d 291. The court found:

> [C]rime in the streets could be reduced by prohibiting all persons from going out in public. However, when fundamental liberties are at stake, the test in a free society is whether there are "less drastic means" available to accomplish the government's purpose. . . . The government may deal directly with masturbation in public picture arcades by persons who know or should know of the presence of others who may be offended by such conduct by arresting and prosecuting them. . . . The record before this court fails to show either that criminal activity is particularly acute at picture arcades or that it is prevalent between the hours of 2 a.m. and 9 a.m.

Id. at 847-48, 166 Cal.Rptr. 859, 614 P.2d 291.

The *Glaze* ordinance is distinguishable. First, preventing masturbation was the only reason for the hours-of-operation restriction, while here the County has different and multiple reasons for its restriction. Second, the *Glaze* ordinance applied to all arcades and not just to those where masturbation was likely to be a problem, while the County's ordinance applies only to adult entertainment businesses. Last, the *Glaze* ordinance required arcades to be closed three more hours per day than the County's ordinance.

More importantly, however, *Glaze* is not controlling because it applied a higher standard than necessary: strict, rather than intermediate, scrutiny. *Id.* at 848-49, 166 Cal.Rptr. 859, 614 P.2d 291. As already noted, the United States Supreme Court established

in *Renton* that intermediate level of scrutiny should be applied when analyzing restrictions on sexually-oriented speech. 475 U.S. at 46-49, 106 S.Ct. 925. Following *Renton,* the California Supreme Court held the time, place, and manner test under the free speech provisions of the California Constitution are analyzed under federal constitutional standards:

> [O]ur formulation of the time, place, and manner test was fashioned from a long line of United States Supreme Court cases, and . . . analysis of speech regulation under article I, section 2(a), employs time, place, and manner restrictions measured by federal constitutional standards. The high court continues to employ the same formulation set out above in its time, place, and manner inquiry.

Los Angeles Alliance for Survival v. City of Los Angeles, 22 Cal.4th 352, 364 n. 7, 93 Cal.Rptr.2d 1, 993 P.2d 334 (2000) (internal quotation marks, citations and alterations omitted). Given these developments in California law, and the Court's finding the County's hours-of-operation restriction meets federal constitutional standards, plaintiffs' summary judgment motion as to the same claim under the California Constitution is denied, and the County's cross-motion is granted.

IV. Interior Configuration (Open-Booth) Requirement

Plaintiff Fantasyland operates an "adult bookstore and arcade." (Andrus Decl., at 2.) The rear portion of the store contains peep show booths (*i.e.*, "small, private viewing areas, each of which has a currency-operated device that facilitates the viewing of adult motion pictures"). (*Id.* at 3.) The peep show booths are "designed to accommodate only one customer at a time" and currently have "lockable doors on them." (*Id.* at 5.)

Fantasyland's complaint challenges two specific requirements of the amended ordinance, which apply to the peep show booths. In pertinent part, the amendment prohibits any "door, curtain, or obstruction of any kind [to] be installed within the entrance to a peep show booth." (LR, at 157 [Ordinance No. 9479, § 21.1816(2)].) Another challenged portion of the amendment states as follows:

> No person shall operate a peep show unless a manager is on duty to ensure its lawful operation and is located at a manager's station which has an unobstructed view of the entrance to each peep show booth.

(*Id.* at 158 [§ 21.1819].) The County moves for summary judgment on Fantasyland's First Amendment claim that these provisions, referred to jointly as "open-booth requirement," violate the First Amendment. Fantasyland cross-moves for summary judgment on the same claims.

Fantasyland acknowledges "regulations comparable to this one have been upheld in this circuit." (Pls.' Joint Mot., at 10.) However, it argues these decisions are not necessarily controlling because of the Supreme Court's more recent decision in *Alameda Books.* Based in large part on *Alameda Books,* Fantasyland contends it is entitled to summary judgment in its favor on this issue for three main reasons. First, it argues the open-booth requirement unconstitutionally reduces the secondary effects by reducing or chilling protected speech. Second, it contends the County relied on "shoddy" evidence to support its rationale for the open-booth requirement, and Fantasyland's evidence casts direct doubt on this rationale. Third, Fantasyland claims the open-booth requirement is not narrowly tailored.

A. Rationale for the Amendment

Fantasyland argues the open-booth requirement will address the secondary effects targeted by the County's amendment by significantly and impermissibly reducing or chilling speech because most customers will not want to view adult movies inside the booths when they no longer offer privacy. (Andrus Decl., at 5.) Fantasyland relies on Justice Kennedy's comment in his concurring opinion in *Alameda Books*: "Though the inference may be inexorable that a city could reduce secondary effects by reducing speech, this is not a permissible strategy." 535 U.S. at 445, 122 S.Ct. 1728.

Justice Kennedy concurred in the judgment but filed a separate opinion in pertinent part because "the plurality's application of *Renton* [to the facts of *Alameda Books*] might constitute a subtle expansion, with which [he did] not concur." *Id.* (Kennedy, J., concurring). He was concerned the analysis did not sufficiently take into account the effect of the challenged ordinance on speech, *i.e.*, the proportionality. At the outset, the government should advance some rationale or basis for a belief "that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact." *Id.* at 449, 122 S.Ct. 1728.

As discussed above, to the extent Fantasyland interprets the concurring opinion as working a fundamental shift in the *Renton* analysis, it is mistaken. *See Alameda Books,* 535 U.S. at 448, 122 S.Ct. 1728 (Kennedy, J., concurring); *Ctr. for Fair Pub. Policy,* 336 F.3d at 1162. In *Center for Fair Public Policy,* the Ninth Circuit rejected an argument similar to the one Fantasyland makes here. The plaintiffs argued an hours-of-operation restriction reduced the secondary effects simply by reducing speech because the patrons prefer to frequent adult entertainment businesses during late night hours, and the ordinance prohibited their operation at that time. *Ctr. for Fair Pub. Policy,* 336 F.3d at 1162. The court disagreed because accepting the plaintiff's argument "cannot be squared with [Justice Kennedy's] insistence that the central holding

of *Renton* remains sound." *Id.* (internal quotation marks and citations omitted).

This is apparent from the example Justice Kennedy offered to clarify his point:

> If two adult businesses are under the same roof, and ordinance requiring them to separate will have one of two results: One business will either move elsewhere or close. The city's premise cannot be the latter. It is true that cutting adult speech in half would probably reduce secondary effects proportionally. But . . . a promised proportional reduction does not suffice. . . . [¶] The premise . . . must be that businesses . . . will for the most part disperse rather than shut down.

Alameda Books, 535 U.S. at 451, 122 S.Ct. 1728. Accordingly, the proportionality inquiry goes to the government's premise or rationale for the ordinance, which cannot be to reduce secondary effects by reducing speech. *Id.* at 449, 122 S.Ct. 1728 ("what proposition does a city need to advance in order to sustain a secondary-effects ordinance"), 451 ("[o]nly after identifying the proposition to be proved can we ask the second part of the question presented: is there sufficient evidence to support the proposition?"). Whether there is sufficient evidence to support the rationale is a separate inquiry. *Id.* at 451, 122 S.Ct. 1728.

In the amended ordinance, the County stated its purpose as:

> It is the purpose of this ordinance to regulate adult entertainment establishments in order to promote health, safety and general welfare of the citizens of the County, and to establish reasonable and uniform regulations to prevent the deleterious effects of adult entertainment establishments within the County. The provisions of this ordinance have neither the purpose nor effect of imposing a limitation or restriction on the content or reasonable access to any communicative materials, including sexually oriented materials.

(LR, at 140-41 [Ordinance No. 9479, § 21.1801(A)].) With the open-booth requirement specifically, the County sought to prevent unlawful sexual activities between patrons and the resulting spread of sexually-transmitted diseases. (LR, at 499-503, 1277-78, 1310, 1313, 1316-17, 1541.) Nothing in the record, including Fantasyland's evidence, suggests the premise was to preclude patrons from viewing peep shows.

Fantasyland relies on the declaration of William H. Andrus, Vice President of Fantasyland and its parent company, who has been closely involved with the development and operation of at least fifty similar businesses in the United States. Mr. Andrus offered his observations based on extensive experience that a change from private to open viewing areas causes an immediate drop in the amount of viewing "typically to

roughly 40% of what it was prior to the change," because "most customers disfavor viewing sexually oriented motion pictures in an open setting." (Andrus Decl., at 5.) Fantasyland argues Mr. Andrus' declaration proves the open-booth requirement will significantly reduce speech. As discussed above, this is not the relevant inquiry. The relevant inquiry is whether reducing speech was the premise for the open-booth requirement. Mr. Andrus' declaration does not speak to this inquiry.

In any event, an open-booth requirement does not reduce speech because it does not limit what movies can be shown, and does not preclude anyone from using the booths as a means for viewing movies —patrons can continue to watch whatever movies they want in the open booths. *Ellwest Stereo Theatres. Inc. v. Wenner,* 681 F.2d 1243, 1247 (9th Cir.1982). Other circuits have also found open-booth requirements to be constitutional time, place, and manner restrictions which do not substantially reduce speech. *See, e.g., Pleasureland Museum, Inc. v. Beutter,* 288 F.3d 988, (7th Cir.2002); *Matney v. County of Kenosha,* 86 F.3d 692, (7th Cir.1996); *Bamon Corp. v. City of Dayton,* 923 F.2d 470, 473 (6th Cir.1991); *Doe v. City of Minneapolis,* 898 F.2d 612, 617 (8th Cir.1990).

To the extent Fantasyland's argument is based on the economic effect the open-booth requirement will have on its business, it is not constitutionally cognizable. *See Spokane Arcade, Inc. v. City of Spokane,* 75 F.3d 663, 665 (9th Cir.1996). As long as there is no

"absolute bar to the market . . . , it is irrelevant whether '[a regulation] will result in lost profits, higher overhead costs, or even prove to be commercially unfeasible for an adult business.'" *Id.* at 666 (alteration in the original) (quoting *Walnut Properties v. City of Whittier,* 861 F.2d 1102, 1109 (9th Cir.1988)); *see also Matney,* 86 F.3d at 700. Accordingly, Mr. Andrus' declaration is insufficient to raise a material issue of fact. *See Anderson,* 477 U.S. at 248, 106 S.Ct. 2505. Based on the foregoing, Fantasyland's argument is unsupported by relevant evidence and fails as a matter of law.

B. Evidentiary Support for the Amendment

Fantasyland next argues the County lacks sufficient evidence in support of its open-booth requirement. The main purpose for the requirement is to prevent unlawful sexual activities between patrons on the premises of adult arcades, and to prevent the resulting spread of sexually-transmitted diseases. To support its rationale for the open-booth requirement, the County cites to a number of studies and reports in the Legislative Record demonstrating the prevalence of unlawful sexual activities between patrons inside the closed booths and "glory holes"[3] between the booths. (LR, at 499-503, 1277-78, 1310, 1313, 1316-17, 1541.) According to the County, these studies

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[3] A "glory hole" is a hole between two adjoining booths used to promote anonymous sex. (LR, at 1310.)

show unprotected sex is common in adult entertainment establishments, which promotes the spread of sexually-transmitted diseases. (Def.'s Mot., at 22 n.15.) Fantasyland argues the County's evidence is shoddy because the proposition sexually-transmitted diseases could be transmitted by the semen left in the booths is not scientifically supported, and the County cited to no evidence criminal activity actually takes place in Fantasyland's booths.

Fantasyland believes the County's rationale for the open-booth requirement is "the transmission of disease with respect to residue from masturbation." (Pls.' Joint Mot., at 10.) Dr. John M. Goldenring, Fantasyland's expert in public health and the transmission of diseases, including sexually-transmitted diseases, reviewed the relevant portions of the Legislative Record, and was not able "to find any support for the proposition that any sexually transmitted disease could be transmitted absent sexual contact." (Goldenring Decl., at 7-8.) According to Dr. Goldenring, absent direct sexual contact between the genitals of one person and the genitals, anus or mouth of another, "the likelihood of a [sexually transmitted disease] being transmitted by bodily fluids, such as semen, urine or saliva existing on surfaces is minute, nearly zero." (*Id.* at 5.) "Other contagious diseases, such as influenza, the common cold, and other viruses and bacterial infections are transmitted through saliva, but not semen or urine." (*Id.*)

Dr. Goldenring's declaration is insufficient as a matter of law to show the County relied on shoddy

evidence. *See World Wide Video,* 368 F.3d at 1195-96. Contrary to Fantasyland's assumption, the record indicates the open-booth requirement is not intended to prevent the transmission of communicable diseases through bodily fluids, such as semen, which could be left by patrons on surfaces inside the booths. Rather, the rationale is based on the finding "[s]exual acts, including masturbation and oral and anal sex, occur at unregulated adult entertainment establishments, especially those which provide private or semi-private booths or cubicles for viewing films or videos or live striptease and sex shows." (LR, at 142 [Ordinance No. 9479, § 21.1801(B)(3)].) Furthermore, the open-booth requirement was intended to "reduce criminal activity, including illegal public sexual activity and prostitution/pandering" as well as "the spread of sexually transmitted diseases and other communicable diseases" which result from illegal sexual contact. (DeWitt Decl., Ex. B, at 3; LR, at 142-43.) Fantasyland's first argument is therefore based on an erroneous premise.

In addition, Fantasyland claims the County has not cited any direct or specific evidence in the Legislative Record to substantiate its assumption criminal activity is actually taking place at Fantasyland or as a result of Fantasyland's business. However, the County is not required to do so. It may rely on findings in relevant case law, as well as the experiences of other local governments, and is not required "to conduct new studies or produce evidence independent of that already generated by other cities, so long as

whatever evidence [it] relies upon is reasonably believed to be relevant to the problem [it] addresses." *See Renton,* 475 U.S. at 51-52, 106 S.Ct. 925. In other words, the County was and is entitled to rely on the studies and reports of others which are included in the record before the Court, as well as on judicial opinions, such as *Spokane Arcade and Ellwest Stereo. Spokane Arcade* and *Ellwest Stereo* reference and rely upon evidence collected by other local governments on the secondary effects associated with closed peep show or arcade booths. *See, e.g., Spokane Arcade,* 75 F.3d at 664-65 (drug usage and sexual conduct between patrons in the video booths, concluding open booths "would reduce the potential for crime"); *Ellwest Stereo,* 681 F.2d at 1245 n. 1 ("[sex-related criminal activity] occurs with great frequency in arcades where movies are exhibited in enclosed booths"). The type of evidence considered by the County in enacting the open-booth requirement has been held "reasonable and relevant" in other cases. *See, e.g., Dream Palace,* 384 F.3d at 1015. In sum, Fantasyland's evidence is insufficient as a matter of law to cast direct doubt on the evidence supporting the County's rationale for the open-booth requirement.

C. Narrowly Tailored

Last, Fantasyland argues the open-booth requirement is not narrowly tailored because there are more effective and less drastic means to accomplish the County's purported objectives. Fantasyland relies

on Mr. Andrus' declaration, which outlines a number of ways to "combat sexual contacts between customers in the viewing areas." (Andrus Decl., at 5.) For example, Mr. Andrus suggests it would be effective to reduce the size of viewing areas so that only one person could fit in a booth and to modify the doors so that they do not reach the floor. He also opined open booths have "considerable drawbacks from the standpoint of avoiding sexual contact between customers" because open booths

> encourage[ ] interaction amongst customers who are viewing motion pictures. When viewing areas are enclosed, customers are insulated from each other. When the viewing areas are open, the combination of sexually explicit motion pictures and an open atmosphere can create a phenomenon, sometimes known as "cruising," where homosexual males meet, culminating in relatively anonymous sexual encounters after they leave the business. That results in sexual activity in the neighborhood surrounding the business over which the business has no control.

(Andrus Decl., at 6.)

Fantasyland's argument—the County's chosen means is not the best—is to no avail, however. Under intermediate scrutiny, the government is not required to establish the means it has chosen is the least restrictive or the most effective for addressing a particular problem. A time, place, and manner restriction is considered narrowly tailored if the government shows

its chosen means "serve[s] a substantial government interest," and affects only that category of businesses shown to produce the unwanted secondary effects. *Renton,* 475 U.S. at 50-52, 106 S.Ct. 925. Nor is the County required to show the open-booth requirement will be effective in combating the negative secondary effects. Local governments "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Id.* at 52, 106 S.Ct. 925.

The uncontradicted evidence in this case shows the open-booth requirement is aimed at reducing unlawful sexual activities and in preventing the resulting spread of sexually transmitted diseases. Fantasyland does not dispute these are substantial government interests. Furthermore, the County's regulation directly targets only that part of adult entertainment business which is known to "produce the unwanted secondary effects." *See Renton,* 475 U.S. at 52, 106 S.Ct. 925. Fantasyland does not dispute this. Although Mr. Andrus' declaration suggests the County could have chosen to address its substantial interests through other means, this is not material under the controlling law.

V. Performance Restrictions

A. Nudity Ban

In its complaint, Deja Vu alleges it had planned to offer nude dancing, and had obtained the appropriate permit from the County, when it acquired its

present premises. Subsequently, the County amended the adult entertainment ordinance to prohibit live nude entertainment. (LR, at 155 [Ordinance No. 9479, § 21.1812(a) ("It shall be a violation of this chapter for a patron, employee or any other person in an adult entertainment establishment, to knowingly or intentionally appear in a state of nudity regardless of whether such public nudity is expressive in nature.")].) The amended ordinance does not prohibit live semi-nude entertainment under conditions specified therein. (*Id.* [§ 21.1812(b)].) Deja Vu claims prior to the amendment, female performers did not have to wear anything more than "pasties and a G-string." (Pls.' Joint Mot., at 12.) After the amendment, they must wear more opaque clothing while performing, which Deja Vu refers to as "pasties and a G-string plus." (*Id.*)

1. The First Amendment Claim

Deja Vu alleges the ordinance as amended violates the First Amendment because it is unjustified based on the factual record and relevant Supreme Court case law. The County moves for summary judgment on Deja Vu's First Amendment claim regarding the nudity ban, and Deja Vu cross-moves on the same claim. Specifically, Deja Vu contends the County lacked sufficient evidence in support of this amendment, and the amendment is not narrowly tailored.

a. Evidentiary Support for the Amendment

Deja Vu argues the evidence the County relied on in amending the ordinance is insufficient because no evidence in the record addresses "secondary effects attributable to non-nude dancing" (*i.e.*, the secondary effects associated with pasties and a G-string plus, rather than just pasties and a G-string). (Pls.' Opp'n, at 14.) The County relied on the Legislative Record described above, which includes numerous studies from other jurisdictions, experiences of other municipalities as reported in case law, and local public testimony regarding secondary effects such as prostitution, public sexual activity, and narcotics trafficking. (*See, e.g.*, LR, at 499-500, 1278, 1310, 1312, 1488-531, 1634-40.) Furthermore, the ordinance itself cites relevant Supreme Court and Ninth Circuit cases which discuss the secondary effects associated with nude dancing. (*See* LR, at 141 [Ordinance No. 9479, § 21.1801].)

Deja Vu does not offer any evidence of its own to cast direct doubt on the County's evidence, but relies exclusively on Dr. Linz' observation "[n]o study specifically deals with adverse secondary effects related to the presence of pasties and G-string establishments." (Linz Decl., at 5.) Essentially, Deja Vu argues the absence of this evidence in the record is sufficient to show the County's evidence is shoddy. Deja Vu's argument was rejected in *Gammoh v. City of La Habra*, where the plaintiffs argued the government's evidence was irrelevant to the ordinance imposing a

minimal distance between patrons and erotic dancers because "it does not measure the secondary effects of *clothed* performances." 395 F.3d 1114, 1127 (9th Cir.2005). "No precedent requires the [government] to obtain research targeting the exact activity that it wishes to regulate: the [government] is only required to rely on evidence 'reasonably believed to be relevant' to the problem being addressed." *Id.* (quoting *Alameda Books,* 535 U.S. at 438, 122 S.Ct. 1728.) The type of evidence considered by the County has been held "reasonable and relevant" in other cases. *See Dream Palace,* 384 F.3d at 1015. Dr. Linz' observation is therefore insufficient as a matter of law to cast doubt on the County's evidence or raise a genuine issue of material fact in opposition to the County's motion.

b. Narrowly Tailored

Deja Vu next argues the amendment goes too far because under the Supreme Court precedent, pasties and a G-string is the maximum amount of clothing a government can require exotic dancers to wear "without running afoul of the federal right to freedom of expression." (Pls.' Joint Mot., at 13.) However, the Court does not interpret the pertinent case law as Deja Vu does.

Nude dancing is "expressive conduct within the outer perimeters of the First Amendment." *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 565-66, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991); *see also Pap's,* 529 U.S.

at 289, 120 S.Ct. 1382. "[G]overnment restrictions on public nudity ... should be evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech." *Pap's,* 529 U.S. at 289, 120 S.Ct. 1382 (plurality opinion). The *Renton* factors applicable to time, place, and manner restrictions and the *O'Brien* framework are "similar or identical." *Colacurcio v. City of Kent,* 163 F.3d 545, 551 (9th Cir.1998) (citing *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)). *United States v. O'Brien* held:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). Deja Vu argues the ordinance at issue is unconstitutional because it does not satisfy the narrow tailoring requirement of the *O'Brien* framework.

Contrary to Deja Vu's argument, case law finding pasties and a G-string to satisfy narrow tailoring does not suggest any additional coverage requirement, no matter how slim, would be unconstitutional:

> [T]he requirement that the dancers don pasties and G-strings does not deprive the dance

> of whatever erotic message it conveys; it simply makes the message slightly less graphic. . . . [¶] . . . [T]he governmental interest served by the text of the prohibition is societal disapproval of nudity in public places and among strangers. The statutory prohibition is not a means to some greater end, but an end in itself. It is without cavil that the public indecency statute is "narrowly tailored"; Indiana's requirement that the dancers wear at least pasties and G-strings is modest, and the bare minimum necessary to achieve the State's purpose.

Barnes, 501 U.S. at 571-72, 111 S.Ct. 2456. Similarly, the holding in *Pap's* does not support Deja Vu's argument:The ordinance regulates conduct, and any incidental impact on the expressive element of nude dancing is *de minimis.* The requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message.

Pap's, 529 U.S. at 301, 120 S.Ct. 1382.

The relevant Supreme Court cases do not stand for the proposition pasties and a G-string is the maximum amount of clothing a government can require exotic dancers to wear without offending the First Amendment. Rather, these cases establish the government has a legitimate interest in placing restrictions on public nudity (*i.e.,* the conduct element of nude dancing), so long as those restrictions have

only a *de minimis* or minimal effect on a dancer's erotic message. In sum, under *Barnes* and *Pap's*, the issue is whether the County's new requirement is still an incidental or "minimal restriction," which "leaves ample capacity to convey the dancer's erotic message." *See Pap's*, 529 U.S. at 301, 120 S.Ct. 1382 (plurality opinion).

Deja Vu contends the amended ordinance imposes more than a minimal restriction on speech because it requires entertainers to wear in addition to pasties also "a swimsuit bottom or shorts to opaquely cover her 'anal cleft or cleavage.'" (Pls.' Joint Opp'n, at 13.) Although this attire would not violate the amended ordinance, it is not required by it. Specifically, the amended ordinance prohibits nudity, which is defined as

> showing of the human male or female genitals, pubic area, vulva, penis, anal cleft or cleavage with less than a fully opaque covering or the showing of the female breast with less than a fully opaque covering of any part of the nipple.

(LR, at 147 [Ordinance No. 9479, § 21.1802(G)].)

The Ninth Circuit has not addressed whether this regulation falls short of *O'Brien*; however, other circuits have considered similar regulations.[4] Deja Vu

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[4] Since it does not appear Deja Vu intends to offer alcohol in addition to nude entertainment, the Court excludes from consideration the circuit court decisions cited by the County

(Continued on following page)

relies on *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County,* 337 F.3d 1251 (11th Cir.2003), where the Court of Appeals reversed and remanded an order granting the government's summary judgment motion. The ordinance at issue prohibited nudity, which was defined more expansively than in *Pap's* "to encompass wearing any clothing covering less than one-third of the buttocks or one-fourth of the female breast," and expressly prohibited "the wearing of G-string, T-backs, dental floss, and thongs." *Id.* at 1273; *see also id.* at 1254 n. 2. Before remanding for consideration whether this definition proscribes too much expression, the court found "it difficult to conclude . . . that preventing erotic dancers from wearing G-strings, thongs, pasties and the like

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which are based on the combination of nudity and alcohol. *See, e.g., Ben's Bar, Inc. v. Village of Somerset,* 316 F.3d 702, 706 n. 5, 727-28 (7th Cir.2003) ("[p]rohibiting alcohol on the premises of adult entertainment establishments will unquestionably reduce the enhanced secondary effects resulting from the explosive combination of alcohol consumption and nude or semi-nude dancing"); *Geaneas v. Willets,* 911 F.2d 579, 582-83 (11th Cir.1990) (district court did not err in analyzing a nudity ban "in establishments dealing in alcohol" under the Twenty-First Amendment, which gives the states the broad authority to regulate alcohol sales, rather than the First Amendment, because of Supreme Court precedent that the states' powers under the Twenty-First Amendment "outweigh any first amendment interest in nude dancing"); *Grand Faloon Tavern, Inc. v. Wicker,* 670 F.2d 943, 944, 946-51 (11th Cir.1982) (affirming the connection between nude and semi-nude entertainment, alcohol consumption, and criminal activity "justified the incidental burdens on First Amendment rights created by the regulation of nude entertainment").

has only a 'de minimis' effect on the expressive component of erotic dancing." *Id.* at 1274. Since *Peek-A-Boo* involved a much more restrictive definition of nudity than the definition at issue in this case, it is not helpful in answering the question whether the County's new definition is still an incidental or "minimal restriction," which "leaves ample capacity to convey the dancer's erotic message."

Heideman v. South Salt Lake City, 348 F.3d 1182 (10th Cir.2003), evaluated the constitutionality of a nudity ban similar to the one at issue here. *Id.* at 1186 n. 4, 1199-1200. The ordinance in *Heideman* prohibited "showing of the human male or female genitals, pubic area, vulva, anus, or anal cleft with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any part of the nipple." *Id.* at 1186 n. 4. *Heideman* found this nudity ban was indistinguishable from that upheld by the Supreme Court in *Pap's.* 348 F.3d at 1185, 1200. Specifically, *Heideman* found the provision was narrowly tailored:

> [T]he district court did not abuse its discretion in concluding that the Ordinance satisfies the fourth and final *O'Brien* factor—that the restriction is no greater than is essential to the furtherance of the government interest—for the same reason that factor was satisfied in *Pap's*: the requirement that dancers wear "g-strings" and "pasties" has a "*de minimis*" effect on their ability to communicate their message.

Id. at 1200.

The Court finds the definition of nudity in *Heideman* is not distinguishable in a constitutionally-meaningful way from the County's new definition. Although *Heideman* referred to the "G-strings and pasties" rather than "G-strings and pasties plus," the actual language of the ordinance, which requires opaque covering of the anal cleft, parallels the County's language here, which requires opaque covering of the anal cleft or cleavage.

Based on the foregoing, and in the absence of any evidence how the County's new requirement would affect the dancers' erotic message, the Court finds Deja Vu has failed to raise a genuine issue of material fact in opposition to the County's summary judgment motion. *A fortiori,* it has failed to meet its burden as the moving party on its cross-motion.

2. The California Constitution Claim

In addition to the First Amendment challenge to the nudity ban, Deja Vu also contends it violates Article I, Section 2 of the California Constitution. While Deja Vu seeks summary adjudication of this issue in its favor, which the County opposes, the County does not raise this issue in its own cross-motion for summary judgment.

Deja Vu contends totally nude dancing is protected under California Constitution, except in establishments serving alcohol. However, Deja Vu's authority, *Morris v. Municipal Court,* 32 Cal.3d 553,

186 Cal.Rptr. 494, 652 P.2d 51 (1982), is distinguishable and no longer supports this proposition.

Morris held a county ordinance was unconstitutionally overboard, and issued a writ of prohibition in favor of a nude dancer who was "arrested for having exposed her buttocks during a performance" in violation of the ordinance. *Id.* at 556, 569, 186 Cal.Rptr. 494, 652 P.2d 51. The ordinance was ultimately found unconstitutional because the only government interest it was intended to serve was the "promotion of public morals," which the court found constitutionally insufficient. *Id.* at 566-69, 186 Cal.Rptr. 494, 652 P.2d 51. As discussed above, unlike in *Morris,* the County's aim here is otherwise.

More importantly, *Morris* is no longer good law. The majority's analysis relied extensively on United States Supreme Court authority for the holding. *Id., passim.* Since *Morris* predates *Barnes* and *Pap's,* it is no longer valid to the extent it prohibited restrictions on nudity which were later approved in *Barnes. See Tily B., Inc. v. City of Newport Beach,* 69 Cal.App.4th 1, 18, 81 Cal.Rptr.2d 6 (1998) ("*Morris* was a state court interpretation of federal constitutional law since foreclosed by *Barnes.*"). Furthermore, the decision in *Morris* is in part based on the proposition the *O'Brien* test does not apply to the regulation of nudity. *Morris,* 32 Cal.3d at 559, 186 Cal.Rptr. 494, 652 P.2d 51. This proposition was negated in *Pap's. See* 529 U.S. at 289, 120 S.Ct. 1382.

Deja Vu also argues the nudity ban is unconstitutional under California law because the free speech provisions of the California Constitution are "more definitive and inclusive than the First Amendment." *See Spiritual Psychic Sci. Church v. City of Azusa,* 39 Cal.3d 501, 519, 217 Cal.Rptr. 225, 703 P.2d 1119 (1985), *overruled in part by Kasky v. Nike, Inc.,* 27 Cal.4th 939, 968, 119 Cal.Rptr.2d 296, 45 P.3d 243 (2002) (quoting *Wilson v. Sup.Ct.,* 13 Cal.3d 652, 658, 119 Cal.Rptr. 468, 532 P.2d 116 (1975)). Deja Vu likens this case to *Pap's* on remand to Pennsylvania Supreme Court, which concluded a similar anti-nudity ordinance violated the Pennsylvania Constitution, although the United States Supreme Court concluded it did not violate the First Amendment. *Pap's A.M. v. City of Erie,* 571 Pa. 375, 812 A.2d 591, 593 (2002). It is beyond question

> the California Constitution is an independent document and its constitutional protections are separate from and not dependent upon the federal Constitution, even when the language of the two charters is the same. (Cal. Const., art. I, § 24.) In this instance, the language of the relevant California constitutional provision differs from, and in some respects is broader than, the federal Constitution.

Los Angeles Alliance for Survival, 22 Cal.4th at 365, 93 Cal.Rptr.2d 1, 993 P.2d 334.

Nevertheless, current California law does not support Deja Vu's argument the California Constitution mandates a different result than the First Amendment in this instance. Without reference to *Morris,* subsequent California Supreme Court opinions have applied the time, place, and manner test "fashioned from a long line of United States Supreme Court cases." *Id.* at 367 n. 7, 93 Cal.Rptr.2d 1, 993 P.2d 334; *see also Raven v. Deukmejian,* 52 Cal.3d 336, 353, 276 Cal.Rptr. 326, 801 P.2d 1077 (1990) ("cogent reasons must exist before a state court in construing a provision of the state Constitution will depart from the construction placed by the Supreme Court of the United States on a similar provision in the federal Constitution."). Accordingly, the same intermediate scrutiny of reasonable time, place, and manner restrictions, applied above to Deja Vu's First Amendment argument, applies to its California Constitution argument.[5]

Based on the foregoing, Deja Vu has not established the County's new nudity ban violates the California Constitution. Accordingly, Deja Vu's summary judgment motion as to the nudity ban claim under California Constitution is denied for the same

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[5] Although California courts rely primarily on California—rather than federal—law to analyze the issue whether a regulation is content-based, *Los Angeles Alliance for Survival,* 22 Cal.4th at 365, 367-78, 93 Cal.Rptr.2d 1, 993 P.2d 334, Deja Vu does not contend the nudity ban is content-based, and does not challenge the applicability of the intermediate scrutiny standard.

reasons its motion with respect to the nudity ban under the First Amendment was denied.

B. Proximity Limit and Staging Requirement

Deja Vu's complaint challenges on First Amendment grounds the proximity limit and staging requirement of the amended ordinance, which requires semi-nude entertainers to perform "at least six (6) feet from the nearest area occupied by patrons and on a stage elevated at least eighteen (18) inches from the floor." (LR, at 155 [Ordinance No. 9479, § 21.1812(b)].) The County moves for summary judgment on this claim, and Deja Vu cross-moves on the same claim. Deja Vu contends that when considered together with the nudity ban, the County lacks sufficient evidence in support of the new distance and staging requirements, and these requirements are not narrowly tailored when considered together with the nudity ban.

The purpose of the proximity limit and staging requirement is to reduce the opportunity for prostitution and narcotics transactions between entertainers and patrons. To support these new requirements, the County relied on the Legislative Record, which, as discussed above, compares favorably to the evidence relied on in other cases to support similar regulations, and which has been found to be "reasonable and relevant" in other cases.

As with the nudity ban, for its argument the County had insufficient evidentiary support, Deja Vu offers no evidence of its own, but relies on Dr. Linz' observation, "[n]o study specifically deals with adverse secondary effects related to the presence of pasties and G-string establishments." (Linz Decl., at 5.) As discussed above, this is insufficient as a matter of law to cast doubt on the County's evidence or raise a genuine issue of material fact in opposition to the County's motion.

Deja Vu also argues the staging requirement and proximity limit are not narrowly tailored when viewed in combination with the nudity ban. Specifically, it contends "nude dance entertainment is totally precluded" or "totally forbidden" and "[d]ancers clothed under the County's [new restriction on nudity] no longer pose the risk of purported adverse secondary effects relied on to justify the elevated stage and proximity limit." (Pls.' Joint Opp'n, at 16-17.) This is an overstatement. As discussed above, in conjunction with the proximity and staging restrictions, the amended ordinance permits semi-nude dancing which requires *de minimis* coverage.

In addition, Deja Vu's unsupported premise—that semi-nude entertainers who perform in close proximity to patrons no longer pose any risk of engaging in prostitution, pandering, or drug trafficking—has been rejected by the Ninth Circuit. *Gammoh v. City of La Habra* considered the constitutionality of an ordinance prohibiting contact between patrons and dancers, and requiring dancers to perform at

least two feet away from patrons. 395 F.3d at 1118-19. The court found the "two-foot rule and the no-touching rule are reasonably linked to the secondary effects that the [government] identifies as its purpose in enacting the Ordinance"—combating "secondary effects, such as solicitation of prostitution and drug transactions." *Id.* at 1125-26. The opinion rejects the argument there is no legitimate justification for the distance requirement in conjunction with the minimal clothing requirement:

> The presence or absence of minimal clothing is not relevant to whether separation requirements fulfill the stated purpose of the Ordinance. This circuit recognizes that municipalities may reasonably find that separation requirements serve the interest of reducing the secondary effects of adult establishments. "Buffers" between patrons and performers prevent the exchange of money for prostitution or drug transactions and allow enforcement of "no touching" provisions, which would otherwise be virtually unenforceable. . . . There is no reason to believe that minimal clothing obviates the need for these measures when the atmosphere is equally charged-money exchanges and touching are no more difficult if the dancer is wearing minimal clothing than if she is partially or fully nude.

Id. at 1127. The proximity and no-touching restrictions were found to be constitutional time, place, and manner restrictions even when considered

in combination with the clothing requirement. *Id.* at 1128.

Similar staging and distance requirements in combination with other regulations were upheld as constitutional. *Colacurcio v. City of Kent* held constitutional an ordinance requiring dancers perform on a platform at least twenty-four inches high and ten feet from the patrons in combination with minimum-lighting and no-tipping provisions. 163 F.3d at 548-49. The plaintiffs had previously offered table dancing, which was prohibited by the new staging and distance requirements, and offered "declarations of a cultural anthropologist and a communications expert attesting to the uniqueness of table dancing and the detrimental effect of the ten-foot rule on the dancer's message." *Id.* at 555. Regardless, the Ninth Circuit concluded "table dancing in private nightclubs, with documented links to prostitution and drug dealing, is a highly unlikely candidate for special protection under the First Amendment." *Id.* at 556. Accordingly, the distance requirement was upheld as a matter of law. *Id.* at 556-57 (the staging requirement was not challenged).

Kev, Inc. v. Kitsap County upheld an ordinance which required "dancing occur on a raised platform at least ten feet from patrons" in combination with a prohibition of certain touching between patrons and dancers, and the prohibition of direct payment or receipt of gratuities, among other things. 793 F.2d 1053, 1056 (9th Cir.1986). The court reasoned:

> Separating dancers from patrons would reduce the opportunity for prostitution and narcotics transactions. Similarly, prohibiting dancers and patrons from engaging in sexual fondling and caressing in an erotic dance studio would probably deter prostitution. Preventing the exchange of money between dancers and patrons would also appear to reduce the likelihood of drug and sex transactions occurring on regulated premises.

Id. at 1061. It further concluded the staging and distance requirements did not unduly burden protected speech:[T]hese regulations do not significantly burden first amendment rights. While the dancer's erotic message may be slightly less effective from ten feet, the ability to engage in the protected expression is not significantly impaired. Erotic dancers still have reasonable access to their market.

Id. Based on the foregoing case law, and in the absence of any evidence, Deja Vu's opposition to the County's summary judgment motion with respect to the staging requirement and proximity limit fails as a matter of law, as does Deja Vu's cross-motion on the same claim.

C. No Direct Tipping

Deja Vu's complaint challenges on First Amendment grounds the provision prohibiting direct tipping. The amended ordinance provides:

> It shall be a violation of this chapter for an employee, who regularly appears in a state of semi-nudity in the adult entertainment establishment, to knowingly or intentionally receive any pay or gratuity directly from any patron, or for any patron to knowingly or intentionally pay or give any gratuity directly to any employee who appears in a state of semi-nudity in the adult entertainment establishment.

(LR, at 155 [Ordinance No. 9479, § 21.1812(c)].) The County moves for summary judgment on Deja Vu's First Amendment claim, and Deja Vu cross-moves on the same claim. In addition, Deja Vu moves for summary judgment on the theory the no-direct-tipping provision violates the Due Process Clause of the Fourteenth Amendment.

1. The First Amendment Claim

The no-direct-tipping provision is intended to work in conjunction with the staging requirement and proximity limit to reduce the opportunity for dancers and patrons to engage in prostitution, pandering, and narcotics transactions. The evidentiary record supporting this provision is the same as that referred to above in support of other performance regulations. For the reasons outlined above, this record is sufficient for the County to meet its initial burden of producing relevant evidence which fairly supports the no-direct-tipping provision. As to the

direct-tipping prohibition, Deja Vu does not contend to the contrary.

Deja Vu recognizes the Ninth Circuit previously rejected a First Amendment challenge to a prohibition on direct tipping. *See Kev,* 793 F.2d 1053. It attempts to distinguish the County's amendment by arguing the provision is "overly broad" and chilling of protected expression.

A First Amendment challenge to a no-direct-tipping regulation was rejected in *Kev.* 793 F.2d at 1061-62. Similarly to the County's amendment in this case, the ordinance in *Kev* provided: "No patron shall directly pay or give any gratuity to any dancer [and] no dancer shall solicit any pay or gratuity from any patron." *Id.* at 1061. In finding the provision a constitutional time, place, and manner restriction, the court reasoned "[p]reventing the exchange of money between dancers and patrons would . . . appear to reduce the likelihood of drug and sex transactions occurring on regulated premises." *Id.*

Deja Vu attempts to distinguish *Kev* by arguing its direct-tipping prohibition was more precise because it applied only to dancers, whereas the County's provision is overly broad[6] because it applies to every

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[6] Although Deja Vu states the direct tipping prohibition is "overbroad" (Pls.' Joint Mot., at 18; Pls.' Joint Opp'n, at 19), it does not argue the First Amendment overbreadth doctrine. Overbreadth is an "exception to the prudential limits on standing." *Young v. City of Simi Valley,* 216 F.3d 807, 815 (9th Cir.2000). Specifically, "[u]nder the overbreadth doctrine, a

(Continued on following page)

employee who "regularly appears in a state of semi-nudity," and is not limited to "during a performance" or to "while in a state of semi-nudity." (Pls.' Joint Mot., at 18.) As discussed above, under intermediate scrutiny, the County is not required to establish the means it has chosen is the least restrictive for addressing a particular problem. A time, place, and manner restriction is considered narrowly tailored if the government shows its chosen means "serve a substantial government interest," and affects only that category of businesses shown to produce the unwanted secondary effects. *Renton,* 475 U.S. at 50-52, 106 S.Ct. 925. Moreover, if the County were to implement Deja Vu's suggestions, the amendment would no longer serve the purpose of reducing the opportunity for dancers and patrons to engage in prostitution, pandering, and narcotics transactions, as "drug and sex transactions between employees and

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plaintiff may challenge government action by showing that it may inhibit the First Amendment rights of parties not before the court[, and] is based on the idea that the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court." *Dream Palace,* 384 F.3d at 999 (internal citations and quotations omitted). However, Deja Vu does not cite to any authority addressing the overbreadth doctrine. Furthermore, standing is not an issue because Deja Vu is an existing adult entertainment business directly affected by the amendment. *See id.* The Court therefore construes Deja Vu's references to overbreadth as an argument the direct-tipping prohibition is not narrowly tailored. To the extent Deja Vu intended to assert the First Amendment rights of its performers, the substantive First Amendment analysis of the direct-tipping prohibition is the same.

patrons would merely be delayed until after the performance, but would still take place on the premises. The same is true if an employee could solicit and accept tips by merely putting on additional clothes immediately following the completion of a performance." (Def.'s Opp'n, at 18.)

Deja Vu next argues the direct-tipping prohibition violates the First Amendment because it imposes a financial disincentive which discourages participation in protected speech. It contends tips are "an important source of income for many service employees," and claims California legislature has determined tipping "warrants special statutory protection." (Pls.' Joint Mot., at 19 [citing Cal. Lab Code § 351].[7]) In essence, Deja Vu is arguing the direct-tipping prohibition violates the First Amendment because of its potential adverse economic impact. Fantasyland made the same economic argument to challenge the open-booth requirement. Deja Vu's economic argument lacks merit for the same reasons Fantasyland's

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[7] In opposition to Deja Vu's summary judgment motion, the County assumes Deja Vu's reference to California Labor Code Section 351 is an attempt by Deja Vu to raise a separate claim under California law for a violation of section 351, and argues the Court should deny any such claim. To the extent Deja Vu intended to allege this claim, it is not included in its operative complaint, and Deja Vu does not seek to amend it. The claim is therefore not included in this action. Furthermore, a review of Deja Vu's briefing on cross-motions for summary judgment indicates the references to section 351 are made to support the argument tipping deserves special protection under the First Amendment rather than in an attempt to raise a new claim.

does. As discussed above, as long as there is no "absolute bar to the market . . . , it is irrelevant whether '[a regulation] will result in lost profits, higher overhead costs, or even prove to be commercially unfeasible for an adult business.'" *Spokane Arcade,* 75 F.3d at 666 (alteration in the original) (quoting *Walnut Properties,* 861 F.2d at 1109); *see also Matney,* 86 F.3d at 698 ("an incidental financial effect on adult entertainment speakers" is of no constitutional significance). Deja Vu presented no evidence from which the trier of fact could infer the County's direct-tipping prohibition represents a complete bar to the market. Furthermore, Deja Vu's argument overstates the implication of the provision. The County's amended ordinance does not prohibit all tipping, and does not preclude entertainers from receiving tips indirectly through the use of a "tip jar." (*See* Def.'s Opp'n, at 18.)

Based on the foregoing, as a matter of law, none of Deja Vu's arguments in support of its First Amendment challenge to the direct-tipping prohibition is sufficient to successfully oppose the County's summary judgment motion, or to prevail on Deja Vu's cross-motion.

2. The Due Process Claim

Deja Vu also claims the direct-tipping prohibition violates due process because it is impermissible vague, and because it violates the liberty interest in working for a living in the common occupations of the community, and the provision "interferes with

occupational liberty interests." (Pls.' Joint Mot., at 20.) Neither argument is sufficient to find the direct-tipping prohibition unconstitutional.

First, Deja Vu argues the phrase "regularly appears in a state of semi-nudity" is impermissibly vague because "regularly" is not defined, and it is unclear whether it means semiannually, daily, monthly, throughout a shift, or "only a couple of times per night." (Pls.' Joint Mot., at 18.) "A fundamental requirement of due process is that a statute must clearly delineate the conduct it proscribes." *Kev,* 793 F.2d at 1057 (citing *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)). "[T]he void-for-vagueness doctrine requires a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson,* 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). For example, a statute which required people on the street "to provide a 'credible and reliable' identification" to a police officer when requested to do so was held unconstitutionally vague because it contained "no standard for determining what a suspect has to do to satisfy the requirement," and thus vested "virtually complete discretion in the hands of the police to determine whether the suspect [had] satisfied the statute." *Id.* at 353-54, 358, 103 S.Ct. 1855.

However, a statute or ordinance is not unconstitutionally vague simply because it includes a flexible

standard or provides some discretion for enforcement officials. For example, an ordinance prohibiting "the making of any noise or diversion which disturbs or tends to disturb the peace or good order" is not unconstitutionally vague. *Grayned,* 408 U.S. at 107-08, 92 S.Ct. 2294. This language is marked by "flexibility and reasonable breadth, rather than meticulous specificity." *Id.* at 110, 92 S.Ct. 2294. Nevertheless, the ordinance was found sufficiently specific because it "clearly delineate[d] its reach in words of common understanding." *Id.* at 112, 92 S.Ct. 2294 (internal quotations omitted); *see also Kev,* 793 F.2d at 1057-58 (" 'Caressing' and 'fondling' are ordinary, commonly used terms," easily understood when read in the context of other ordinance provisions). "[W]here first amendment freedoms are at stake, an even greater degree of specificity and clarity of laws is required." *Kev,* 793 F.2d at 1057.

Likewise, "regularly" is a word of common understanding and of sufficient definiteness that ordinary people can understand. The dictionary definition of "regular" is "recurring, attending, or functioning at fixed or uniform intervals." Merriam-Webster's Collegiate Dictionary, 986 (10th Ed.1998). Deja Vu argues the term is vague because there is nothing to indicate precisely how many times an employee must appear in a state of semi-nudity to have "regularly" done so. For example, could penalties be imposed against an employee hired as a waitress who collects tips during her shift and then occasionally appears as a dancer in a state of a semi-nudity? The answer is yes, based on

the dictionary definition and common sense meaning of the word. "[E]ven a low frequency of occurrence can establish regularity," and the term "regularly" is not vague simply because it does not specify the frequency. *City of Cleveland v. Daher,* No. 98-CVH-12396, 2000 WL 1844739, **4-6, 2000 Ohio App. LEXIS 5937, at *15-17 (Ohio Ct.App.2000). "[S]ome imprecision is unavoidable." *Id.*; *see also Grayned,* 408 U.S. at 110, 92 S.Ct. 2294 ("we can never expect mathematical certainty from our language").

Although a constitutional vagueness challenge to the use of the word "regular" or "regularly" in the context of an adult entertainment ordinance has not been considered by the Ninth Circuit, similar challenges have been rejected by other courts based on the reasons discussed above. *See 511 Detroit St., Inc. v. Kelley,* 807 F.2d 1293, 1295-97 (6th Cir.1986) (anti-obscenity law imposing criminal penalties for dissemination of obscene materials as a "predominant and regular part" of a business found not unconstitutionally vague, reasoning a statute is not unconstitutional just because "there are cases near the margin where it is difficult to draw the line"); *Britt v. State of Florida,* 775 So.2d 415, 416-17 (Fla.Ct.App.2001) (parole condition forbidding those convicted of sexual crimes against children from working, volunteering, or living near any "school, daycare center, park, playground, or other place where children regularly congregate" was "sufficiently precise," and not unconstitutionally vague); *Haviland Hotels, Inc. v. Oregon Liquor Control Comm'n,* 20 Or.App. 115, 530 P.2d

1261, 1262-63 (1975) (local regulation requiring certain businesses to provide "regular meals during the usual hours when such meals are regularly served" not void for vagueness because "regular meals" has "a clear, grassroots connotation"); *Daher*, 2000 WL 1844739, *4, **4-6, 2000 Ohio App. LEXIS 5937, at *13, 15-17 (zoning law restricting location of adult cabarets which "regularly" feature topless dancers held not unconstitutionally vague because the term "regularly" was not so imprecise that it could not be understood by ordinary persons without a statement by the government setting forth "a distinct frequency below which topless entertainment is not subject to the zoning ordinance"). Accordingly, the Court finds the term "regularly" as used in the no-direct-tipping provision of the amended ordinance is not impermissibly vague.

In its second due process argument, that the direct-tipping prohibition interferes with occupational liberty interests, Deja Vu restates its First Amendment claim as a substantive due process claim. However, "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'" *Albright v. Oliver*, 510 U.S. 266, 273, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) (quoting *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)).

Based on the foregoing, Deja Vu's summary judgment motion is denied with respect to the due process challenges to the direct-tipping prohibition. Furthermore, since this challenge fails as a matter of law, the due process claim is dismissed.

D. No Touching

Deja Vu's complaint challenges on the First Amendment grounds the no-touching provision of the County's amended ordinance, which provides in pertinent part:

> It shall be a violation of this chapter for an employee who regularly appears in a state of semi-nudity in an adult entertainment establishment, to knowingly or intentionally touch a customer or the clothing of a customer while on the premises of the establishment.

(LR, at 155 [Ordinance No. 9479, § 21.1812(d)].) The County moves for summary judgment on this claim, and Deja Vu cross-moves on the same claim.

The no-touching provision is intended to work in conjunction with the other performance restrictions discussed above to reduce the opportunity for dancers and patrons to engage in prostitution, pandering, and narcotics transactions. The legislative record supporting the no-touching provision is the same as that discussed above, and is sufficient to meet the County's initial burden of producing relevant evidence which fairly supports the no-touching provision.

A First Amendment challenge to a no-touching provision has been rejected by the Ninth Circuit. *Kev,* 793 F.2d at 1061-62. As with the direct-tipping prohibition, Deja Vu attempts to distinguish the County's amendment by arguing it is not narrowly tailored[8] because it is not limited to "sexual touching," it is redundant when considered together with the staging requirement and proximity limitation, interferes with an individual's right to associate, and because it is directed only to the employees and not the patrons. (Pls.' Joint Mot., at 21; Pls' Joint Reply, at 12.)

The County's amendment differs from the ordinance in *Kev* because is not limited to sexual touching, and it focuses on employee—rather than patron—conduct. Deja Vu argues a patron could grope or grab an "employee who regularly appears in a state of semi-nudity" but the employee would not be free to push the patron away. These distinctions, however, are without a difference. As discussed above, a time, place, and manner restriction is considered narrowly tailored if the government shows its chosen means "serve a substantial government interest," and affects only that category of businesses shown to produce the unwanted secondary effects. *Renton,* 475 U.S. at 50-52, 106 S.Ct. 925. Intermediate scrutiny does not require the government to establish the means it has chosen to address the secondary effects

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[8] Although Deja Vu again refers to terms such as "overly broad," it does not argue the overbreadth doctrine.

is the least restrictive. *Id.* Furthermore, the chosen means may discriminate or be under-inclusive without offending the First Amendment, because the government does not have to attempt to address all of its interests at one time. In *Renton,* for example, the location restriction only applied to adult theaters and not to other types of adult businesses. This is permissible because the government "must be allowed a reasonable opportunity to experiment with solutions" and may choose to single out and place limitations on "one particular kind of adult business." *Id.* at 52-53, 106 S.Ct. 925. In addition, the government has broad discretion in selecting a method "to further its substantial interests." *Id.* at 52, 106 S.Ct. 925. It is therefore of no constitutional significance that the County directed the no-touching provision to the employees' conduct, not the patrons.'

Deja Vu further argues the no-touching provision is not narrowly tailored because the proximity limit and the staging requirement already make touching between patrons and performers "impossible." (Pls.' Joint Mot., at 21.) Deja Vu is mistaken in light of the express language of the performance restrictions. The proximity limit and staging requirement do not make touching impossible because they only apply while the employee is "in a state of semi-nudity." (LR, at 155 [Ordinance No. 9479, § 21.1812(b)].) In contrast, the no-touching provision applies at all times "while on the premises of the establishment" to employees who regularly appear in a state of semi-nudity. The provisions are therefore not redundant

but complementary. Furthermore, they target conduct likely to lead to the unwanted secondary effects of prostitution, pandering and drug trafficking.

Last, Deja Vu contends the touching ban is not narrowly tailored because it "runs from shaking the hand of a regular customer to hugging a relative or close friend, even when the entertainer is fully clothed." (Pls.' Joint Mot., at 21.) Deja Vu's argument is an overstatement; employees who regularly appear in the state of semi-nudity on the business premises are free to associate with whomever they choose when not on the premises.

Based on the foregoing, Deja Vu's arguments are insufficient as a matter or law to successfully oppose the County's summary judgment motion. *A fortiori,* they are insufficient to entitle Deja Vu to summary judgment on its cross-motion.

VI. Zoning Restrictions

In its complaint Deja Vu challenges the amended zoning ordinance.[9] Prior to amendment, the ordinance permitted adult entertainment businesses to be located in commercial zones, provided they were at least 500 feet from residential zones, 600 feet from any church, school, public playground, park or recreational area, and 1,000 feet from any other adult

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[9] As discussed below, as a practical matter, this provision affects only Deja Vu.

entertainment business. While the amendment retains the distance and separation requirements, it requires adult entertainment businesses to locate in industrial, rather than commercial, zones. (*See* LR, at 25 [Ordinance No. 9469, § 6930(b)(2)].) Businesses such as Deja Vu, which had obtained a permit to operate in a commercial zone prior to the amendment, must relocate to an industrial zone within three years.

The zoning ordinance was amended to reduce the negative secondary effects, specifically the blight, noise, traffic, and crimes such as robbery, property theft, assault and battery, which affect neighboring businesses and their patrons in commercially zoned areas. In addition, the amendment was intended to ameliorate decreased property values in commercially zoned areas.

Deja Vu alleges the zoning amendment violates "the adult public's right to freedom of speech, press and expression protected by the First and Fourteenth Amendments to the United States Constitution, and Article 1, § 2 of the California Constitution." (First Am. Compl., at 20; *see also id.* at 14 & 23.) The County moves for summary adjudication on Deja Vu's claim, and Deja Vu cross-moves on the same claim. The County contends the amended zoning ordinance meets the First Amendment intermediate scrutiny. Deja Vu does not dispute intermediate scrutiny applies to the zoning amendment, however, it contends the amendment fails to meet its requirements. In addition, Deja Vu argues the procedural safeguards of

the zoning amendment are not constitutionally sufficient, the amendment is void because it violates the County's General Plan, and constitutes unlawful spot zoning.

A. The General Plan

Deja Vu contends the zoning ordinance amendment is invalid because it is inconsistent with the County's General Plan.[10] *See* Cal. Gov't Code § 65860. It seeks a finding that the amendment is unlawful on this basis, or in the alternative, contends the County's motion for summary adjudication of the constitutionality of the amendment be denied on this basis.

The General Plan claim is not raised in Deja Vu's operative complaint, and Deja Vu does not explain how its General Plan argument relates to the freedom of speech claims raised in the complaint. As the General Plan claim is not alleged in the complaint,

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[10] California Government Code Section 65860(a) states in part: "County or city zoning ordinances shall be consistent with the general plan of the county or city. . . ." Section 65860(b) states in part: "Any resident or property owner within a city or a county, as the case may be, may bring an action or proceeding in the superior court to enforce compliance with subdivision (a). Any such action or proceeding shall be governed by Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure. No action or proceeding shall be maintained pursuant to this section by any person unless the action or proceeding is commenced and service is made on the legislative body within 90 days of the enactment of any new zoning ordinance or the amendment of any existing zoning ordinance."

and Deja Vu does not seek to amend it, its motion for summary judgment is denied to the extent it is based on this claim.

In the alternative, Deja Vu's motion as to the General Plan claim is denied because it has failed to show the zoning amendment is inconsistent with the General Plan. "Once [a municipality] has adopted a general plan, all zoning ordinances must be consistent with that plan, and to be consistent must be 'compatible with the objectives, policies, general land uses, and programs specified in such a plan.'" *Lesher Communications, Inc. v. City of Walnut Creek,* 52 Cal.3d 531, 536, 277 Cal.Rptr. 1, 802 P.2d 317 (1990) (quoting Cal. Gov't Code § 65860(a)(ii)). [A] finding of consistency requires only that the proposed project be *compatible* with the objectives, policies, general land uses, and programs specified in the applicable plan. The courts have interpreted this provision as requiring that a project be in agreement or harmony with the terms of the applicable plan, not in rigid conformity with every detail thereof. *San Franciscans Upholding the Downtown Plan v. City & County of San Francisco,* 102 Cal.App.4th 656, 678, 125 Cal.Rptr.2d 745 (2002) (internal quotation marks and citations omitted). "A zoning ordinance inconsistent with the general plan at the time of its enactment is invalid when passed." *deBottari v. City Council of the City of Norco,* 171 Cal.App.3d 1204, 1212, 217 Cal.Rptr. 790 (1985) (internal quotation marks and citations omitted).

Deja Vu relies on the declaration of R. Bruce McLaughlin, its land use planning and development expert. (McLaughlin Decl., at 18-25 & Ex. A.) Mr. McLaughlin opined the General Plan permits commercial uses in industrial zones so long as those commercial uses provide essential support services to manufacturing plants and their personnel. Deja Vu submits adult entertainment is not an essential support service to manufacturing plants and their personnel.

On the other hand, the County offers the opinion of David Hulse, the Land Use Chief for the County, in support of its argument that the amendment is consistent with the General Plan. (Hulse Supplemental Decl., at 1.) Mr. Hulse was "primarily responsible for drafting the amendment to the County's zoning ordinance that requires adult entertainment establishments to be located in industrial zones." (*Id.* at 1-2.) The General Plan states: "The Industrial Designations provide locations for manufacturing, industrial, wholesaling, and warehousing uses based on the potential nuisance characteristics or impacts of use." According to Mr. Hulse, the County's Department of Planning and Land Use "determined that the zoning ordinance amendment is consistent with the County's General Plan. . . . Specifically, the Department concluded adult entertainment establishments exhibit greater 'nuisance characteristics or impacts' than do most typical commercial establishments. Because the nuisance characteristics or impacts associated with adult entertainment establishments are closer to

those exhibited by most industrial uses, the County determined it was more appropriate to require adult businesses to be located in industrial zones, where they will be more compatible with neighboring uses." (*Id.* at 2.) Deja Vu does not oppose or in any way address the County's evidence or argument that the amendment is consistent with the General Plan.

Since Deja Vu would bear the burden of proof at trial as to its General Plan claim, it has a higher burden on summary judgment. "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence . . . establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage,* 213 F.3d at 480 (internal quotation marks and citations omitted). In other words, it "must make a 'showing sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party,'" and "must establish beyond peradventure all of the essential elements of the claim or defense to warrant judgment in [its] favor." *Pecarovich v. Allstate Ins. Co.,* 272 F.Supp.2d 981, 985 (C.D.Cal.2003) (internal citations omitted) (citing *Calderone v. United States,* 799 F.2d 254, 259 (6th Cir.1986) and quoting Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 487-88 (1984)).

Based on the language of the General Plan and expert opinions offered by each side, the Court cannot conclude Deja Vu made a showing sufficient to hold no reasonable trier of fact could find other than in

Deja Vu's favor. Accordingly, even if Deja Vu had amended its complaint to include the General Plan claim, its summary judgment motion would be denied for failure to rebut the County's evidence.

Furthermore, since the General Plan argument is not responsive to the constitutional issues raised in the County's summary adjudication motion, issues of fact pertaining to the General Plan argument are not material. *See Anderson,* 477 U.S. at 248, 106 S.Ct. 2505 (a fact is material if it could affect the outcome of the suit under the governing substantive law). To the extent Deja Vu relies on the General Plan argument to oppose the County's summary judgment motion, it is legally insufficient.

B. Reasonable Time, Place, and Manner Regulation

Deja Vu contends the zoning amendment does not meet the intermediate scrutiny standard because is not supported by evidence showing it would advance a substantial government interest, is not narrowly tailored, and does not leave open reasonable alternative means of communication.

1. Rationale for the Amendment

Deja Vu argues the amendment is unconstitutional because it is aimed at reducing secondary effects by reducing speech. "[T]he necessary rationale for applying intermediate scrutiny is the promise that

zoning ordinances like this one may reduce the costs of secondary effects without substantially reducing speech. For this reason, it does not suffice to say that inconvenience will reduce demand and fewer patrons will lead to fewer secondary effects." *Alameda Books,* 535 U.S. at 450, 122 S.Ct. 1728 (Kennedy, J., concurring).

Deja Vu first argues the distance and dispersal provisions of the zoning ordinance before amendment achieved the same purpose of reducing secondary effects as after amendment, but without burdening the speech as much. This argument is unsupported by any evidence, and is therefore insufficient to raise a genuine issue of material fact. *See Anderson,* 477 U.S. at 249, 106 S.Ct. 2505 ("there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party").

In the alternative, based on the County's responses to interrogatories, Deja Vu argues the zoning ordinance was amended to relocate adult entertainment businesses to industrial zones because this would reduce the number of adult entertainment patrons. If this were the County's reasoning for the amendment, it may well be impermissible; however, when the County's response to interrogatories is considered in context, Deja Vu's argument is not based on a fair reading of the County's rationale. The pertinent portion of the County's response was:

The County believes that requiring adult entertainment establishments to be located in the industrial zones will reduce the negative secondary effects associated with adult entertainment establishments. Particularly, the County believes that blight, noise, traffic, and certain crimes including robbery, property theft, assault and battery will be reduced. The industrial zones are generally located further from residential areas than are the industrial *[sic]* zones. Thus, requiring adult entertainment establishments to be located in industrial areas will reduce noise, traffic, and crime that effect *[sic]* residential property owners. In addition, decreased residential property values will be ameliorated by requiring adult entertainment establishments to be located in industrial zones. Further, most commercial establishments rely on customers to visit their premises. Many industrial facilities ship their products to middlemen and therefore fewer customers tend to visit their premises. Thus, requiring adult entertainment establishments to be located in industrial areas will reduce noise, traffic, and crime that effect *[sic]* commercial property owners and their patrons. In addition, decreased commercial property values will be ameliorated by requiring adult entertainment establishments to be located in industrial zones. Finally, fewer citizens tend to frequent industrial zones as compared to commercial zones, particularly at night. Thus, the zoning change should reduce crimes such as assault, battery, robbery, and

> property theft by reducing the number of potential victims.

(Manicom Opp'n Decl., Ex. 1, at 5-6.) Deja Vu's argument is based entirely on the last two sentences of the response, ignoring the preceding text.

The response, when considered in its entirety, does not support the conclusion the County amended the ordinance to reduce the number of customers by making it more inconvenient to patronize adult entertainment businesses. Instead, the focus was on the patrons of the neighboring businesses. Furthermore, many industrial businesses are closed at night when adult entertainment businesses are busiest. The neighboring industrial businesses and their patrons would therefore not be as affected by secondary effects such as noise, traffic and crime, as are commercial businesses, which are often open at night. The reference in the response to reducing the number of potential crime victims therefore referred to the patrons of the neighboring businesses, rather than to adult entertainment patrons. Based on the foregoing, Deja Vu's argument regarding the rationale for the amendment is not supported by evidence from which a rational trier of fact could infer the County's aim was to reduce the number of adult entertainment patrons rather than to reduce the secondary effects.

2. Evidentiary Support for Amendment

Deja Vu next argues the zoning amendment was enacted without evidentiary support. As outlined

more fully above, Deja Vu relies on the declaration of Dr. Linz, who concluded the studies relied on by the County in enacting the amendments are unreliable. However, for the reasons discussed above, Dr. Linz' declaration is insufficient as a matter of law to cast direct doubt on the County's evidence, because it addresses only the studies and not other categories of evidence on which the County relied, and because it targets only some of the numerous secondary effects the amendment was intended to ameliorate. *See World Wide Video,* 368 F.3d at 1195-96. Dr. Linz' declaration is therefore insufficient to support Deja Vu's summary judgment motion, or to raise a genuine issue of material fact in opposition to the County's cross-motion.

3. Alternative Avenues of Communication

Zoning restrictions on adult entertainment businesses must allow "for reasonable alternative avenues of communication." *Renton,* 475 U.S. at 50, 52, 106 S.Ct. 925. "[T]he First Amendment requires only that [the government] refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the [municipality]." *Id.* at 54, 106 S.Ct. 925. The "reasonable alternative avenues of communication" inquiry consists of two steps. "[W]e first have to determine how many alternative sites are available, and then determine whether that number is sufficient to afford adult establishments a reasonable opportunity to

locate." *Isbell v. City of San Diego,* 258 F.3d 1108, 1112 (9th Cir.2001) (internal citation omitted).

In its motion for summary judgment, the County contends the zoning amendment leaves 76 sites available for Deja Vu's relocation. In its cross-motion and in opposition to the County's motion, Deja Vu argues many of the sites identified by the County are not "available" as that term is defined for purposes of intermediate scrutiny, and the remaining sites are too few to constitute reasonable alternative avenues of communication.

a. Availability of Alternative Sites

The burden of persuasion is on the County to demonstrate its amendment provides reasonable alternative avenues of communication. *See Isbell,* 258 F.3d at 1112. The County "cannot merely point to a random assortment of properties and simply assert that they are reasonably available to adult businesses." *See Lim,* 217 F.3d at 1055. If the County provides "a good faith and reasonable list of potentially available properties," the burden shifts to Deja Vu "to show that certain sites would not reasonably become available." *See Isbell,* 258 F.3d at 1113 n. 5 (internal quotation marks and citation omitted). On the other hand, if Deja Vu can show the County's attempt "is not in fact in good faith or reasonable, by, for example, showing that a representative sample of properties are on their face unavailable, then the

[County] will be required to put forth more detailed evidence." *See Lim,* 217 F.3d at 1055.

The County contends it has met its burden by identifying a total of 76 potentially available sites in the relevant real estate market, located in industrial zones and within the distance and separation requirements of the amended ordinance. (Hulse Decl., at 2.) These sites are located in eight different areas: Borrego Springs, Ramona, San Dieguito/Rancho Bemardo, Lakeside, Alpine, Pepper Drive – Bostonia, El Cajon, and Spring Valley. (*Id.* at 2; *see also* Nevin Decl.) In addition, the County used its Geographic Information System ("GIS"), which measures the distance between two points, and determined "that twelve adult entertainment establishments could operate simultaneously on the 76 sites identified by the County and still comply with the 1,000 feet separation requirement between adult entertainment establishments." (Hulse Decl., at 2.)

"For sites to be available, they must be in the 'actual business real estate market.'" *Isbell,* 258 F.3d at 1112-13 (quoting *Lim,* 217 F.3d at 1055). The following factors are relevant to the consideration whether a site is reasonably within the business real estate market:

> (1) a relocation site is not part of the market if it is unreasonable to believe that it would ever become available to any commercial enterprise; (2) a relocation site in a manufacturing or industrial zone that is reasonably accessible to the general public may also be

> part of the market; (3) a site in a manufacturing zone that has proper infrastructure may be included in the market; (4) a site must be reasonable for some generic commercial enterprise, although not every particular enterprise, before it can be considered part of the market; and (5) a site that is commercially zoned is part of the relevant market. . . . In addition, a site must obviously satisfy the conditions of the zoning ordinance in question.

Id. at 1113 n. 3 (quoting *Lim,* 217 F.3d at 1055).

Deja Vu contends "there are no sites available anywhere in unincorporated San Diego County for Adult Use," because all of the sites identified by the County are located in industrial zones which are not suitable for generic commercial land uses. (McLaughlin Decl., at 7.) Deja Vu claims this unsuitability is evidenced by "the absence of existing commercial uses" in these industrial zones, as well as the fact the only commercial uses permitted in industrial zones are adult entertainment establishments and essential or compatible support services to manufacturing plants and their personnel. (*Id.* at 9, 16.) Specifically, Deja Vu points out several sites do not have sidewalks and lighting.

The mere fact a site is located in an industrial zone does not make it unavailable. Relocation sites in industrial zones are considered available, if they are reasonably accessible to the public and have the appropriate infrastructure. *Topanga Press,* 989 F.2d

at 1531. Whether the infrastructure provided is adequate depends on whether it is reasonably necessary for any generic commercial enterprise. *Diamond,* 215 F.3d at 1056. Roads, lighting and sidewalks are not required for every industrially-zoned site, "rather these are examples of what may constitute proper infrastructure." *Id.* Sites located along highways or main driving thoroughfares where it is unlikely people would walk along a sidewalk to reach the business, might not need sidewalks and street lighting, especially if the sites have other examples of infrastructure which may support a commercial enterprise, such as power, water, and access to a main road. *Id.*

The County's unrefuted evidence shows the sites lacking sidewalks and street lighting are located near major highways or major secondary roads. (Nevin Decl., at 3.) Based on *Diamond,* sidewalks and street lighting are unnecessary because the patrons would drive and not walk to the business. All the sites have access to power, are served by piped water or wells, or could be served by wells, and either have access to telephone service or could require the telephone company to install lines. (*Id.*) Deja Vu's argument that the sites are unavailable because they are located in industrial zones and lack streetlights and sidewalks fails as a matter of law.

In addition, Deja Vu argues many of the sites are unavailable because they are not suitable for an adult entertainment business due to low traffic, lack of visibility, current occupancy, unwillingness to lease to

adult entertainment businesses, or unsuitability of existing premises for an adult entertainment use. (Luster Opp'n Decl.) This argument, which raises business and economic factors, is irrelevant under the governing law.

As long as it is a part of an actual business real estate market for generic commercial enterprises, whether a site is economically or physically suited for adult entertainment use is irrelevant. *Isbell,* 258 F.3d at 1113; *see also Topanga Press,* 989 F.2d. at 1531 ("[I]t is constitutionally irrelevant whether relocation sites located in industrial or manufacturing zones suit the *particular* needs of an adult business."). "[T]he possible economic impact upon a business is not a factor to be considered by the courts when determining whether a [municipality] has provided a business with a reasonable alternate location." *Topanga Press,* 989 F.2d at 1529. If it is a part of an actual real estate market for generic commercial enterprises, "it is not relevant whether a relocation site will result in lost profits, higher overhead costs, or even prove to be commercially infeasible for an adult business." *Id.* at 1531. Furthermore, current occupancy and restrictive lease terms prohibiting adult uses are irrelevant. *Lim,* 217 F.3d at 1055 (restrictive leases banning adult entertainment and current occupancy); *Diamond,* 215 F.3d at 1056 (current occupancy); *Renton,* 475 U.S. at 53-54, 106 S.Ct. 925 (current occupancy).

The County concedes three of the 76 sites are occupied by single-use buildings such as warehouses

and factories, which are over 65,000 square feet. (Nevin Decl., at 3.) This type of large single-use buildings "may arguably be outside [the] commercial real estate market." *See Lim,* 217 F.3d at 1055. Accordingly, the Court will not consider these sites in the analysis.[11]

Excluding the three large single-use sites, the Court finds the County met its burden to come forward with a good faith and reasonable list of potentially available sites. The County provided pertinent, specific and detailed information about each site. *See Lim,* 217 F.3d at 1055. Sites such as swamps, sewage treatment plants, airstrips for airports, sports stadiums, and land under the ocean are generally considered unavailable. *Topanga Press,* 989 F.2d at 1531, 1532. The County's list does not contain properties which on their face appear to be unavailable. *See Lim,* 217 F.3d at 1055-56. The burden therefore shifts to Deja Vu to show certain sites would not reasonably become available. *Id.*

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[11] The County does not identify the three sites. Based on a detailed review of the exhibits attached to Mr. Nevin's declaration, the Court excludes sites no. 8 and 11 in Area 4 (parcels no. 326-050-12 and 326-060-18) and site no. 12 in Area 7 (parcel no. 483-071-11).

(i) Separation and Distance Requirements

Deja Vu challenges specific sites based on the argument they do not meet the distance and separation requirements of the amended ordinance. To be available, the site must meet the requirements of the zoning ordinance in question. *Isbell,* 258 F.3d at 1113 n. 3 (quoting *Lim,* 217 F.3d at 1055). The burden is on Deja Vu to show certain sites would not reasonably become available. *See id.* at 1113 n. 5.

Based on the opinion of its expert, Bruce R. McLaughlin, Deja Vu argues three sites in Area 7 may not meet the segregation requirements, because it appears several parcels may have been merged into one. (McLaughlin Decl., at 12.) In his subsequent deposition, however, Mr. McLaughlin withdrew this opinion. Deja Vu's argument therefore remains without evidentiary support. In the absence of any evidence, Deja Vu failed to make a sufficient showing in support of its summary judgment motion, or raise a genuine issue of material fact in opposition to the County's motion, on the issue whether the sites in Area 7 are unavailable due to the separation requirements.

Deja Vu next argues the two sites in Area 5 are not available because they violate the distance requirement of the amended ordinance. The ordinance prohibits adult entertainment establishments from being located "within 600 feet of any . . . public playground or park." (LR, at 25 [Ordinance No. 9469,

§ 6930(b)(2)].) Deja Vu contends the Veterans of Foreign Wars Facility, which includes the Tom C. Dyke Veterans Park, is located within 600 feet of two sites. (McLaughlin Decl., at 12.)

The term "park" is not defined in the amended ordinance, although other portions of the zoning code contain definitions. The County contends the Tom C. Dyke Veterans Park is not a public park as defined in one of the zoning code sections, which defines "Public Active Park/Playground/Recreational Area" as: "An outdoor area, along with its incidental buildings and structures, owned and/or operated by a public agency or a non-profit organization, which is designed, developed and intended to provide one or more recreational opportunities to the general public." (Def.'s Ex. 9 [San Diego County Zoning Ordinance § 1110].) A supporting declaration by the County's Land Use Chief states as follows:

> 4. In September 2004, I visited the VFW facility located in the Alpine area. The facility has a sign stating "Tom C. Dyke Veterans Park." There is no indication that this site is being used as a park. There are no recreational facilities of any type (picnic tables, trails, play equipment, etc.) on this site. In fact, the site is located on a fairly steep slope. There is no indication that the site is open to the public and I saw no members of the public at the site during my visit. Attached to the County of San Diego's Exhibits In Support Of Its Opposition To Plaintiffs' Motion For Summary Judgment as Exhibit 10 are

> true and correct copies of the photographs that I took during my visit to the VFW facility.
>
> 5. The County has determined that the "Tom C. Dyke Veterans Park" is not a park within the meaning of section 6930(b)(2) of the County's zoning ordinance, and is committed to that determination.
>
> (Supplemental Hulse Decl., at 2.)

It is undisputed a park is located within 600 feet of two of the proposed sites. The parties disagree whether the park fits the meaning of the undefined term as used in the amended ordinance. The County does not provide any argument why section 1110, as opposed to some other definition of the term "park" in the zoning ordinance applies to interpret the amendment. Assuming section 1110 controls, the Court finds the County's evidence is insufficient to show the park does not meet the definition of that section. While neither side presented sufficient evidence to prevail on their respective cross-motions, the Court finds each side presented sufficient evidence to successfully oppose the other's summary judgment motion. Accordingly, a disputed issue of fact remains whether the two sites comprising Area 5 are unavailable for failure to meet the distance requirement.

(ii) Long-Term Leases

Deja Vu contends some of the sites are unavailable because they are occupied by tenants with long-term

leases. "[A] long-term lease may exclude a site from the commercial market." *Isbell,* 258 F.3d at 1113. Deja Vu's evidence consists of Mr. Luster's declaration regarding sites in Areas 3 and 6. (Luster Opp'n Decl., at 4.) The County objected to these portions of the declaration on the grounds of lack of personal knowledge, lack of foundation and hearsay. The Court agrees the pertinent statements are not admissible evidence. Only admissible evidence may be considered in deciding a motion for summary judgment. Fed.R.Civ.P. 56(e); *Beyene v. Coleman Sec. Serv., Inc.,* 854 F.2d 1179, 1181-82 (9th Cir.1988). Deja Vu's argument based on long-term leases therefore lacks evidentiary support. Accordingly, Deja Vu failed to meet its burden on its summary judgment motion, or to raise a genuine issue of material fact in opposition to the County's motion, on the issue whether any sites in Areas 3 and 6 are unavailable due to long-term leases.

(iii) Physical Impediments to Use

Deja Vu next contends "[o]ne parcel in Area 2 is vacant land located in a river bed." (McLaughlin Decl., at 14.) The County maintains the parcel is almost three acres and at least a portion of it "would be suitable for construction of structures" even if part of it is located within a floodway. (Def.'s Opp'n, at 31-32.) The County's argument is weakened by Mr. Nevin's declaration, however, which asserts the site is "mostly located in the river bed." (Nevin Decl., Ex. A, Tab 2 (emphasis added).) On the other hand, Deja

Vu's expert, Mr. McLaughlin, does not categorically state the site is in a floodway or on a flood plain, or could not be developed for some other reason.

It is undisputed the site is mostly located in the riverbed. The parties disagree whether it can be developed for a generic commercial enterprise. While neither side presented sufficient evidence to prevail on their respective cross-motions, the Court finds each side presented sufficient evidence to successfully oppose the other's summary judgment motion. Accordingly, a disputed issue of fact remains whether one site in Area 2 (parcel no. 281-182-14) could be developed.

Deja Vu next contends "Area 4 has one parcel (326-050-11) located on a steep hillside, which could not be developed, and many of the parcels have steep slopes which are often an impediment to urban development." (McLaughlin Decl., at 14.) The County argues the site is available because of its large size (53.34 acres) and an existing business on it. However, the County's argument does not address the parcel identified by Mr. McLaughlin. While Mr. McLaughlin was referring to parcel no. 326-050-11, the County was referring to parcel no. 326-050-19. (*Cf.* McLaughlin Decl., at 14 and Def.'s Opp'n, at 31.) The exhibit to Mr. Nevin's declaration pertaining to parcel no. 326-050-11 shows the size of the parcel is 7.53 acres, states it has no buildings, notes "very steep lot," and contains a photograph of a steep undeveloped slope without even a billboard. (Nevin Decl., Ex. A, at 4-4.)

The Court therefore finds the County failed to raise a genuine issue of material fact in opposition to Deja Vu's summary judgment motion, and failed to meet the burden as the moving party on its motion with respect to parcel no. 326-050-11. Accordingly, the Court finds parcel no. 326-050-11 in Area 4 is unavailable. As to the remaining unidentified steep sites mentioned by Mr. McLaughlin, the Court finds Deja Vu failed to raise a genuine issue of material fact in opposition to the County's summary judgment motion, and failed to meet the burden as the moving party on its own summary judgment motion.

(iv) Toxic Waste

Deja Vu argues portions of some of the areas are unavailable because of toxic waste. The only evidence offered in support of this argument is Mr. McLaughlin's declaration:

> It appears that hazardous wastes may be present on or around the sites in Areas 4 and 6, and Area 4 has warning signs posted that there are carcinogens present in the area. Hazardous wastes are also likely to be present in Areas 2, 3 and 7. These sites must be considered unavailable as alternative avenues of communication for Adult Use.
>
> (McLaughlin Decl., at 15.)

However, the County points to Mr. McLaughlin's deposition testimony, arguing his opinion about unavailability due to the presence of hazardous wastes

lacks foundation and proper basis. With respect to Areas 3 and 7, Mr. McLaughlin testified he did not observe anything or take any pictures indicating hazardous waste was present. (Def.'s Ex. 12 [McLaughlin Depo., at 107].) The Court therefore finds Deja Vu's argument lacks evidentiary support with respect to hazardous waste on any sites in Areas 3 and 7. However, as to Areas 4 and 6, Mr. McLaughlin testified he observed barrels and storage of derelict vehicles, which in his experience often generate hazardous waste. (*Id.* at 97-103, 105-07.) As to Area 2, he testified he based his opinion on the observation one site in Area 2 was used as a service station. (*Id.* at 107.) The Court notes exhibits to Mr. Nevin's declaration show several sites in Areas 2, 4 and 6 are occupied by various automotive businesses and junk yards. Mr. McLaughlin further testified he observed carcinogen signs on one site in Area 4. (*Id.* at 97-99.) The Court finds Mr. McLaughlin's deposition testimony provided sufficient basis for his opinions. This evidence is therefore admissible. The Court further finds it is sufficient to raise a genuine issue of fact regarding contamination of some of the sites in Areas 2, 4 and 6.

This issue of fact, however, is not material because, without any information regarding the extent of contamination, hazardous waste mitigation is generally a matter of the expense of developing a relocation site. The Ninth Circuit has not yet addressed the issue whether contamination could render a site unavailable; however, other courts have. *See, e.g., Centerfold Club. Inc. v. City of St. Petersburg,* 969

F.Supp. 1288, 1302 (M.D.Fla.1997) (irrelevant whether environmental contamination would make property more expensive to purchase, lease, or develop). Specifically, the Eleventh Circuit, following *Renton* and relying in part on *Topanga Press,* held having to clean up hazardous waste generally is not an impediment to relocation of "constitutional magnitude" for purposes of reasonable alternative avenues of communication. *David Vincent, Inc. v. Broward County,* 200 F.3d 1325, 1334-35 (11th Cir.2000) (hazardous waste generated by a car repair business). As in *David Vincent,* there is not enough evidence in this case to support an inference the hazardous waste would be a prohibitive obstacle to relocation. *See id.* at 1335. This conclusion is reinforced by Mr. McLaughlin's own testimony, indicating hazardous waste contamination issues pervade the commercial real estate market, and environmental assessments are a normal part of commercial real estate transactions:

> Q. Isn't it fair to say, Mr. McLaughlin, that with respect to—if you are going to buy land these days, you're going to do—before you do that—a little due diligence on the environmental nature of the land?
>
> A. One would hope so.
>
> Q. Make sure there hasn't been—there isn't a hazardous waste problem?
>
> A. One would hope so.

(Def.'s Ex. 12 [McLaughlin Depo., at 107-08; *see also id.* at 105].) Since hazardous waste is essentially

an economic issue inherent in the commercial real estate market, it cannot be considered for purposes of reasonable alternative avenues of communication. *See Topanga Press,* 989 F.2d at 1530. The mere presence of hazardous waste, without any evidence as to its extent or showing it is prohibitive to any generic commercial enterprise, is insufficient as a matter of law to render a site unavailable. Deja Vu therefore has failed to present sufficient evidence to raise a genuine issue of material fact in opposition to the County's summary judgment motion or to prevail on its own summary judgment motion as to this issue.

(v) Accessibility

Deja Vu contends a number of sites are not sufficiently accessible because they are landlocked, not accessible by roads serving commercial traffic, or lack public transportation. Although the Ninth Circuit has not yet considered whether a site with any of these characteristics is available, it has established a site must be reasonably accessible to the general public. *See Isbell,* 258 F.3d at 1113; *Lim,* 217 F.3d at 1055.

Deja Vu contends a number of sites in Areas 1, 7 and 8 are landlocked. A truly landlocked site is presumably not available because it would not be accessible to the general public. On the map, all the sites identified by Deja Vu appear landlocked. However, the County's evidence suggests the sites are accessible. As to sites in Area 1 (parcels no. 141-210-23 and

141-210-09), its photographs show they are accessible by a dirt road. (Nevin Decl., at 2 & Ex. A, Tab 1.) As to sites in Area 7 (parcels no. 483-022-35, 483-071-05, 483-071-09), the photographs show cars, existing businesses and structures. (*Id.* Tab 7.) Although the County's evidence is circumstantial, it is more substantial than a mere "scintilla of evidence" raising "some metaphysical doubt as to material facts." *See Anderson,* 477 U.S. at 252, 106 S.Ct. 2505; *Matsushita,* 475 U.S. at 586, 106 S.Ct. 1348. Reasonable inferences which can be drawn from it support the County's claim the sites are not landlocked. Deja Vu does not address this evidence. As the burden is on Deja Vu to show a site would not reasonably become available, the Court finds it failed to present sufficient evidence to prevail on its summary judgment motion or to raise a genuine issue of material fact in opposition to the County's motion with respect to sites in Areas 1 and 7.

As to the sole site in Area 8, the County makes no argument and points to no evidence suggesting it is accessible. The photograph of the site does not show the presence of any road, vehicle or functional structure, and it is not clear from the map of the area whether the site abuts a road. (Nevin Decl., Ex. A, Tab 8). Neither side presented any evidence regarding the existence of easements, which may render an apparently landlocked parcel accessible or inaccessible. With respect to the sole site in Area 8, the Court therefore finds neither side presented sufficient

evidence in support of its respective summary judgment motion.

Deja Vu next contends Areas 3 and 5 are only accessible by roads which do not serve commercial traffic. (McLaughlin Decl., at 15.) Deja Vu does not contend these areas are not accessible by a road. The County's evidence shows Area 3 as a developed office park near Rancho Bernardo. The photographs show roads, parking lots and cars. (Nevin Decl., Ex. A, Tab 3.) The aerial photograph of the two sites comprising Area 5 shows them abutting Tavern Road. (*Id.* Tab 5.) Deja Vu does not attempt to rebut the County's evidence or explain why these areas are not accessible to the public in general, or commercial traffic in particular. As the burden is on Deja Vu to show a site would not reasonably become available, the Court finds it failed to present sufficient evidence to prevail on its summary judgment motion or to raise a genuine issue of material fact in opposition to the County's motion with respect to accessibility of the sites in Areas 3 and 5.

Deja Vu next contends Areas 3, 6, and 7, or portions thereof, are unsuitable for commercial use because adequate parking is not available. (McLaughlin Decl., at 13.) A site must comply with the zoning ordinance in question to be available. *Isbell,* 258 F.3d at 1113 n. 3; *Lim,* 217 F.3d at 1055. Deja Vu's argument is undercut by its expert's deposition testimony. Mr. McLaughlin admitted, at least as to some of the sites, parking garages could be built above the surface parking lots, underground parking structures

could be built below the buildings, or a commercial business could use a nearby parcel to provide parking for the site. (Def.'s Opp'n, at 34 (citing Ex. 12, at 51-52, 55, 57-60; Ex. 13 [Zoning Ordinance § 6785(a)]).) With respect to these sites, the parking issue does not go to the availability of the site, but to the economic impact of relocation on the site, an issue which cannot be considered in this analysis. *Topanga Press,* 989 F.2d at 1529. Deja Vu does not address Mr. McLaughlin's testimony in its papers. Furthermore, the photographs of many of the sites in these areas show vacant surface parking. (Def.'s Opp'n, at 34 (citing Nevin Decl., Ex. A, Tabs 3, 6 & 7).) Deja Vu does not address this evidence. As the burden is on Deja Vu to show a site would not reasonably become available, the Court finds it failed to present sufficient evidence to prevail on its summary judgment motion or to raise a genuine issue of material fact in opposition to the County's motion with respect to parking for the sites in Areas 3, 6 and 7.

Last, Mr. McLaughlin makes a cryptic remark in his declaration that "[n]o public transit is apparent in any of the Areas." (McLaughlin Decl., at 15.) Deja Vu does not elaborate on this in its points and authorities, and offers no case law to suggest public transportation is necessary before a site is considered accessible. The Court's own research has revealed no authority necessitating access by public transportation. Since Deja Vu does not argue public transit is necessary, this issue is waived for purposes of this

motion. *See Indep. Towers of Wash. v. Washington,* 350 F.3d 925, 929 (9th Cir.2003).

(vi) Other

Mr. McLaughlin also opined one site in Area 7 is not available because the building on the site straddles parcel lines "in a way that disqualifies most of the structure and a portion, if not all, of the one storefront that might otherwise qualify as an Adult Use site." (McLaughlin Decl., at 13-14.) This is another point Deja Vu does not elaborate on in its points and authorities. Since Deja Vu does not present any argument or legal authority to show why this site is unavailable, this issue is waived for purposes of this motion. *See Indep. Towers of Wash.,* 350 F.3d at 929.

Based on the foregoing, three of the thirteen sites in Area 4 (parcels no. 326-050-11, 326-050-12 and 326-060-18) and one of the fourteen sites in Area 7 (parcel no. 483-071-11) have been disqualified. In addition, issues of fact exist as to one of the eighteen sites in Area 2 (parcel no. 281-182-14), both sites comprising Area 5, and the sole site in Area 8.

b. Sufficiency of the Available Sites

"Once the areas that are not part of the market are excluded, the question becomes whether the remaining acreage provides the Adult Businesses with a reasonable opportunity to relocate." *Topanga Press,* 989 F.2d at 1532. "There is no constitutional

requirement that [the government] make available a certain number of sites." *Diamond,* 215 F.3d at 1056.

The parties disagree as to the method the Court should apply to address this issue. The four Ninth Circuit decisions applying the *Renton* standard have addressed two types of cases. In *Walnut. Properties* and *Topanga Press,* the Ninth Circuit addressed the situation where numerous adult entertainment businesses were competing for a relatively small number of available relocation sites. In *Walnut Properties,* thirteen existing businesses were presented with a "small handful" of available sites which could operate simultaneously in light of the 1,000-foot separation requirement. 861 F.2d at 1103, 1108. The court held this did not allow for reasonable alternative avenues of communication. *Id.* at 1110. Similarly in *Topanga Press,* at least 102 adult entertainment businesses were competing for approximately 120 available sites, which could not operate simultaneously due to the 1,000-foot separation requirement. 989 F.2d at 1533. The court again found this was not sufficient. *Id.*

On the other hand, in *Young v. City of Simi Valley* and *Diamond,* the court was faced with a situation where the first adult entertainment applicant sought a permit under a new zoning ordinance. In *Young,* four available sites, which could operate simultaneously, were held sufficient as a matter of law for the location of the sole applicant in the absence of any evidence the ordinance otherwise had a chilling effect. 216 F.3d 807, 811, 818 n. 10, 822-23 (9th

Cir.2000). In *Diamond,* the court held the separation requirement was irrelevant in determining the number of sites because there was only one applicant, and held a total of seven available sites was constitutionally sufficient. 215 F.3d at 1056-57.

It is undisputed only Deja Vu is in need of a relocation site. Three adult entertainment businesses have ever operated in the unincorporated San Diego County: Fantasyland, Deja Vu, and Innspot East, which was annexed into the City of Lemon Grove in 1981. All three businesses are still in existence. There have never been any other adult entertainment businesses in the unincorporated San Diego County. Only Innspot East and Deja Vu applied for an adult entertainment license in the last 25 years. Fantasyland was exempt from this requirement pursuant to a settlement with the County. (*See* Pelowitz Decl., at 1-2.) At the time the ordinance was amended, only Fantasyland and Deja Vu were operating in the unincorporated San Diego County. (Joint Stmnt of Undisputed Facts, at 5.) It is undisputed Fantasyland is exempt from the requirements of the amended zoning ordinance pursuant to the settlement, which leaves only Deja Vu in need of a relocation site. (*See* Pls.' Joint Opp'n, at 26 n. 24.)

Neither side presented any evidence of additional businesses or individuals interested in operating an adult entertainment business in the unincorporated area of the San Diego County. Given the small number of businesses ever to apply for an adult entertainment license, the Court finds the fact Deja Vu is

not the first business ever to apply, but is the sole business required to relocate after the amendment, is a distinction without a difference. Accordingly, the instant case is factually more akin to *Young* and *Diamond* than to *Topanga Press* and *Walnut Properties.*[12]

After the four excluded sites are accounted for, 72 of the 76 sites remain available. If the four additional sites as to which there is an issue of fact are also excluded for purposes of the analysis, 68 sites remain available in six areas: 1, 2, 3, 4, 6 and 7. It is undisputed due to the 1,000-foot separation requirement between adult entertainment businesses, Areas 1, 3 and 6 can simultaneously support only one adult entertainment business each. (McLaughlin Decl., at 15; Hulse Decl., at 3.) It is also undisputed Area 4 is large enough for two businesses to operate simultaneously, provided they are located at opposite ends of the area. (*Id.*) However, if an adult entertainment business were to locate in the center of Area 4, then only one business could operate in that area.

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[12] *Diamond* and *Young* each approached differently the issue which number of sites is relevant when only one business seeks a location. In *Diamond,* the court applied the total number of available sites, and in *Young* it applied the number which can operate simultaneously under the separation requirements of the zoning ordinance. Although the two approaches result in a vastly different number of sites in this case, the Court finds the difference is not relevant. For purposes of this analysis, the Court will follow the approach taken in *Young,* as the more recent of the two cases.

(McLaughlin Decl., at 15.) The parties disagree on how many adult entertainment businesses could operate simultaneously in Areas 2 and 7. The County's evidence shows up to three businesses could operate simultaneously in Area 3, while Deja Vu's evidence shows only up to two could operate simultaneously. (*Cf.* Supplemental Hulse Decl., at 2; Def.'s Ex. 14 *and* McLaughlin Decl. at 15.) As to Area 7, the County's evidence shows it could support up to two businesses simultaneously, while Deja Vu's evidence shows it could support only one. (*Cf.* Supplemental Hulse Decl., at 2; Def.'s Ex. 15 *and* McLaughlin Decl., at 15.) Accordingly, if Deja Vu's evidence is believed, at most eight adult entertainment businesses can operate simultaneously on the total 68 sites. Deja Vu does not contend Fantasyland's present location further diminishes the number of sites which can operate simultaneously. If the County's evidence is believed, the largest possible number of simultaneously occupied sites is ten. Since only Deja Vu seeks a relocation site, it can choose among all the available sites. No matter which party's evidence is believed, the number of sites which could be simultaneously occupied by adult entertainment businesses in this case is greater than the number found sufficient in *Diamond* and *Young*.

However, "[d]ata regarding the number of sites available for adult use is meaningless without a contextual basis for determining whether that number is sufficient for that particular locale." *Young,* 216 F.3d at 822. Supply and demand, therefore "should be

only one of several factors that a court considers when determining whether an adult business has a 'reasonable opportunity to open and operate' in a particular city." *Id.* (quoting *Topanga Press,* 989 F.2d at 1529). "A court should also look to a variety of other factors including, but not limited to, the percentage of available acreage theoretically available to adult businesses, the number of sites potentially available in relation to the population, community needs, the incidence of [adult businesses] in other comparable communities, [and] the goals of the city plan." *Young,* 216 F.3d at 822 (internal quotations omitted).

The parties presented evidence of the percentage of the available acreage and the number of potentially available sites in relation to the population in the unincorporated San Diego County. The parties agree the unincorporated area encompasses 2,286,059 acres, with 2,318.66 acres zoned for industrial use. In addition, the County offers, and Deja Vu does not dispute, 2,764.86 acres are zoned for commercial use. After the four disqualified sites are accounted for, the 72 remaining sites amount to a total of 235.16 acres available for adult entertainment use. If the additional four sites as to which there are questions of fact are also excluded, the remaining acreage is 227.03. The parties disagree whether the relevant comparison is between the available sites and the total acreage of the unincorporated area, or the total acreage which could potentially be available to adult entertainment businesses if it were not for the

amended zoning ordinance. While *Young* states the pertinent factor is "the percentage of available acreage theoretically available to adult businesses," 216 F.3d at 822, it does not expressly answer this issue. Furthermore, in *Walnut Properties,* the court relied on the acreage of the entire municipality. *See* 861 F.2d at 1108; *see also Renton,* 475 U.S. at 53, 106 S.Ct. 925. The issue presented here, however, was not addressed in either case, and the choice was made without discussion. The purpose of the comparison ultimately is to determine whether an adult business has a "reasonable opportunity to locate," and the focus is on the "actual business real estate market" where a generic commercial enterprise could potentially operate. *See Isbell,* 258 F.3d at 1112-13. The Court therefore finds the areas which would not be available to a generic business should be excluded. In this case, the relevant comparison is therefore made between the acreage of the available sites and the total industrially- and commercially-zoned acreage in the unincorporated area, which totals 5,083.52 acres. Based on this comparison, Deja Vu will be able to consider sites located on 4.46% of the total industrially and commercially zoned acreage.

In comparing the acreage available to adult entertainment businesses to the population, the parties disagree about the population of the unincorporated area. Deja Vu bases its comparison on 674,440 people, taken from a population summary chart on the County's website. (*See* McLaughlin Decl., at 5.) The County, relying on the estimate of the California

Department of Finance, contends the population is 470,000 as of January 1, 2004. (Def.'s Opp'n, at 36 (citing Manicom Decl., at 3 & Ex. 1; Def.'s Ex. 16).) However, when the population summary chart on the County's website is examined, it shows an existing population of 446,080 based on the 2000 census, and a population of 674,440 under the heading of "April 2004 Working Copy." (Def.'s Ex. 17.) The County explains this heading refers to "the maximum population (674,440) the unincorporated area of the County will be able to accommodate if the Proposed General Plan is enacted by the Board of Supervisors." (Supplemental Hulse Decl., at 3.) Deja Vu does not address the County's explanation, and does not offer any explanation why it chose this population number. It is plain the pertinent population number is the existing population, most recently estimated at 470,000. Based on the actual population, the 227.03 acres of potentially available sites amounts to approximately 4.83 acres per 10,000 persons.[13]

In its opposition to the County's motion, Deja Vu offers a comparison chart comparing the acreage and population statistics of this case to those of *Walnut Properties* and *Renton*. The comparison, however, is

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[13] Deja Vu's calculation, based on a population of 674,440 and available adult entertainment acreage of 233.4 acres, appears to be in error, even if the Court were to accept its underlying premises. Deja Vu contends these numbers yield 0.35 acres per 10,000 persons. (Pls.' Joint Mot., at 30.) The correct calculation is: 233.4 acres divided by 674,440 persons, multiplied by 10,000 persons, which yields 3.46 acres per 10,000 persons.

irrelevant as a matter of law because each case must be examined on its own facts. *See Young,* 216 F.3d at 821, 822 ("*Renton* requires a case by case analysis;" the inquiry is "whether that number is sufficient for that particular locale"). Furthermore, neither in *Renton* nor in *Walnut Properties* were the circumstances analogous to the unincorporated County. In *Walnut Properties* thirteen businesses were vying for "a small handful" of sites, with supply apparently not meeting the demand. 861 F.2d at 1104, 1108. On the other hand, in *Renton* the supply was far greater than the demand. 475 U.S. at 52-53, 106 S.Ct. 925. For all of the above reasons, the statistics which can be derived from these two cases cannot be viewed as defining the scope of what constitutes reasonable alternative avenues of communication in this case.

Given the evidence presented by the parties, including the history of scant demand for adult entertainment licenses, the lack of evidence showing others wish to open an adult entertainment business in the unincorporated County, the number of potentially available sites and their acreage, the total industrial and commercial acreage and population in the unincorporated area, the Court finds the County met its burden in opposition to Deja Vu's summary judgment motion and in support of its own summary judgment motion to show the number of sites available to adult entertainment businesses under the

amended ordinance is sufficient to provide reasonable alternative avenues of communication.[14]

C. Procedural Safeguards

The amended ordinance requires an administrative permit to establish, operate, enlarge, or transfer ownership or control of an adult entertainment establishment. A permit application must be approved if the adult entertainment business location meets the distance and separation requirements of the amended ordinance. Deja Vu challenges the provision of the amended ordinance, which outlines the applicable administrative permit procedure, claiming it fails to provide for a "timely decision" on an application and precludes prompt access to the courts. (Pls.' Joint Mot., at 26.) The County maintains the ordinance requires it to act on a permit application within a reasonable time, and the time allowed for the County to consider an appeal is also reasonable. The County moves for summary judgment and a finding the permit application process of the amended ordinance is constitutional. Deja Vu cross-moves for a finding it is an unconstitutional prior restraint on speech.

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[14] For purposes of reaching this conclusion, the Court assumed Deja Vu could disqualify at trial the four sites as to which it raised an issue of fact. Accordingly, the factual issues pertaining to those sites are not material, because they could not affect the outcome of this case. *See Anderson,* 477 U.S. at 248, 106 S.Ct. 2505.

In *FW/PBS, Inc. v. City of Dallas,* the plaintiffs challenged a licensing ordinance for adult entertainment businesses. 493 U.S. 215, 220, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). "A scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing permissible speech." *Id.* at 227, 110 S.Ct. 596. Two essential procedural safeguards are required for a valid licensing scheme. *Id.* First, "the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained." *Id.* at 228, 110 S.Ct. 596. Second, "there must be the possibility of prompt judicial review in the event that the license is erroneously denied." *Id.*; *see also City of Littleton v. Z.J. Gifts D-4. L.L.C.*, 541 U.S. 774, 781-82, 124 S.Ct. 2219, 159 L.Ed.2d 84 (2004).

Under the licensing scheme in *FW/PBS,* licenses were to be issued within thirty days following the receipt of an application, and after the premises were inspected and approved by the health, fire, and building officials. There was no time limit for completing the inspections, and applicants had no way to ensure the inspections would occur within the thirty-day period. *FW/PBS,* 493 U.S. at 227, 110 S.Ct. 596. As a result, a license could be postponed indefinitely. *Id.* at 229, 110 S.Ct. 596. The ordinance was found unconstitutional because it did not "provide for an effective limitation on the time within which the licensor's decision must be made," and because it failed "to provide an avenue for prompt judicial

review so as to minimize suppression of the speech in the event of a license denial." *Id.*

The principles discussed in *FW/PBS* were applied by the Ninth Circuit in *Kev, Inc. v. Kitsap County.* The ordinance in *Kev* required erotic dancers and operators of erotic dance studios to obtain licenses, but there was a five-day waiting period to obtain licenses after filing applications. 793 F.2d at 1060. Because the government "failed to demonstrate a need" for curtailing the dancers' First Amendment rights for five days while an application was pending, the court declared the five-day waiting period for dancers unconstitutional. *Id.* The five-day waiting period for the operators was found constitutional because the government "presented a sufficiently compelling justification." *Id.* at 1060 n. 6. The government anticipated topless dancing establishments were likely to require a "significant reallocation of law enforcement resources," and five days was a reasonable time for the government to make adjustments given its limited resources. *Id.* The court also noted there was "no reason for a new studio operator not to apply for a license one week before he plans to open his facility." *Id.* Accordingly, *Kev* places the burden on the government to explain the time period it needs to decide whether to grant or deny a license application. *Kev,* 793 F.2d at 1060.

In this case, the parties do not agree what period of time is allowed under the amended ordinance to make a licensing decision. Deja Vu contends the County has eighty days to act on an application plus

another sixty days to consider an appeal, for a total of 140 days. The County maintains it has seventy days to make the decision on a permit application plus sixty days to consider an appeal, for a total of 130 days. This factual dispute is not material. Even if the Court assumes the County is correct, and the applicable period is 130 days,[15] the County presented no

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[15] The parties' respective calculations of the time period are as follows: The amended zoning ordinance states in pertinent part, a permit application "shall be acted upon by the Director following a public hearing within forty (40) days following receipt of the complete application pursuant to Section 65943 of the Government Code. . . . The director shall make his ruling within ten (10) days following the hearing." (LR, at 24 [Ordinance No. 9469, § 6930(b)(1)].) In pertinent part, California Government Code Section 65943(a) states:

> Not later than 30 calendar days after any public agency has received an application for a development project, the agency shall determine in writing whether the application is complete and shall immediately transmit the determination to the applicant for the development project. If the written determination is not made within 30 days after receipt of the application, . . . the application shall be deemed complete. . . .

The time limit for the County to act on a permit application begins to run when the application is "accepted as complete." *Ni Orsi v. City Council of the City of Salinas,* 219 Cal.App.3d 1576, 1585, 268 Cal.Rptr. 912 (1990).

Although the Director can act sooner, he or she can wait thirty days until the permit application is deemed complete by operation of law. At that time, the forty days in which the Director must hold a public hearing begins to run. Assuming the Director holds the hearing on the fortieth day, the Director must make a ruling within ten days following the hearing. Thus, the County can take as many as eighty days (*i.e.,* 30 + 40 + 10) to make a decision on a permit application. If an administrative

(Continued on following page)

evidence to show why it needs so much time and why this period is reasonable.

Because permit issuance is conditioned solely on a finding of compliance with nondiscretionary distance criteria, *i.e.*, the distance and separation from specified land uses, Deja Vu argues the time to rule on the permit application "exceeds the brief, reasonable period contemplated by *FW/PBS* for a permit decision." (Pls.' Joint Mot., at 26.) On the other hand, the County contends thirty days to determine whether a permit application is complete is not "subject to the *FW/PBS* time limitation," and the forty days to make a decision meets the reasonableness standard based on subsequent case law, which found longer time periods constitutional. The County cites no relevant authority to support its argument the thirty days to determine whether an application is complete should not be counted for purposes of the reasonableness inquiry under *FW/PBS*. The standard set forth in *FW/PBS* requires the procedure "provide for an effective limitation on the time within which the licensor's decision must be made" and "provide for prompt judicial review," which suggests it would be relevant to consider all applicable time periods from

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permit is denied, the County then has another sixty days to make a determination on an appeal, which means an applicant could potentially be unable to seek judicial review for 140 days (*i.e.*, 30 + 40 + 10 + 60). The County's interpretation of these two sections results in a maximum 130-day period because the County contends the ten-day period for issuing a decision "is not tacked on to the earlier 40-day period." (Def.'s Opp'n, at 24.)

the submission of the application until judicial review becomes available to the applicant. 493 U.S. at 229, 110 S.Ct. 596.

The County also cites three cases to support its argument: *Redner v. Dean,* 29 F.3d 1495 (11th Cir.1994); *TK's Video v. Denton County, Tex.,* 24 F.3d 705 (5th Cir.1994); *Wolff v. City of Monticello,* 803 F.Supp. 1568 (D.Minn.1992). None of these cases supports the County's position.

The ordinance at issue in *Redner* placed a 45-day time limit on the government's decision to grant or deny an application, which was found constitutionally reasonable.[16] 29 F.3d at 1497-98, 1501. In the 45 days, the government was to determine whether the adult entertainment business complies with the building, fire, health and zoning regulations. *Id.* at 1497. The *Redner* ordinance is distinguishable because all the County has to do before deciding whether to issue a permit in this case, is to determine whether the business meets the distance and separation requirements of the zoning ordinance. (*See* LR, at 25 [Ordinance No. 9469, § 6930(b)(2)].)

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[16] The court found the ordinance unconstitutional because of two other provisions which created the risk expressive activity could be suppressed for an indefinite period of time: the ordinance only provided the applicant "may be permitted" to begin operating if the government did not make a decision within 45 days, and the ordinance only provided for an appeal to be heard "*as soon as the Board's calendar will allow.*" *Id.* at 1501.

TK's Video is distinguishable for the same reasons as *Redner*. The licensing ordinance in *TK's Video* provided the government sixty days following receipt of an application to issue an operating license, unless certain disqualifying factors were found. 24 F.3d at 708. This did not place an undue burden on speech because "[l]icensing entails reviewing applications, performing background checks, making identification cards, and policing design, layout, and zoning arrangements." *Id.* This case is distinguishable because the County's application review entails only the determination if the distance and separation requirements are met, and does not include the kind of checks which justified a longer time frame in *TK's Video*.

In *Wolff*, the operator of an adult video store challenged an ordinance which allowed the government ninety days to grant or deny a license. 803 F.Supp. at 1570, 1574. The district court noted "[t]he ninety-day time period prescribed in the ordinance does not appear to be unreasonable per se." *Id.* at 1574. However, it nevertheless found the ordinance unconstitutional because it made "no provision for the continued operation of an existing adult use pending the completion of the application process." *Id.* at 1575.

The County's cases do not reach the heart of the issue raised by Deja Vu: the reasonableness of the delay to issue permits under the circumstances of this case. Compliance with the distance and separation requirements, the only factor in the permit decision,

can be quickly verified through the County's GIS system, which measures the distance between two points. (*See, e.g.,* Supplemental Hulse Decl., at 2.) In addition, Deja Vu submitted a copy of a Final Decision of the Zoning Administrator dated August 9, 2001, which indicates on one occasion the Director made a final determination on an administrative permit application only nine days after it was received for processing. (Manicom Reply Decl., Ex. 5.) Deja Vu also points to the San Diego Municipal Code Section 123.0306, which requires the City Manager to approve or deny an application for a Zoning Use Certificate for an adult entertainment establishment in only fifteen business days after receipt.

On the other hand, the County has offered no evidence to show why it needs 130 days for the entire process. The only explanation it presented for the lengthy time frame is the unsupported statement the sixty days allowed to consider an appeal is reasonable "given the fact an appeal to the County's elected Board is involved."

The Court therefore finds the County presented no evidence to show the time period for issuing a permit pursuant to the amended ordinance is reasonable, an issue as to which it bears the burden at trial. Due to the lack of evidence on this point, the County failed to meet its burden as the moving party on summary judgment, and has also failed to raise a genuine issue of material fact in opposition to Deja Vu's cross-motion. The Court finds Ordinance No. 9469, Sections 6930(b)(1) and 7064, unconstitutional,

to the extent it fails to impose reasonable time limits on the decisionmaker to act on administrative permit applications, as required by *FW/PBS*.

Neither party addresses whether invalidating the time periods specified in sections 6930(b) and 7064 results in striking the entire ordinance or severing the unconstitutional provisions. The Legislative Record provided by the County does not include a severability clause applicable to Ordinance No. 9469. However, its absence does not automatically preclude severance. *See Barlow v. Davis,* 72 Cal.App.4th 1258, 1264, 85 Cal.Rptr.2d 752 (1999). The severability "determination depends on whether the remainder is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidity of the statute." *Id.* (internal quotation marks, citations and alterations omitted). Based on the Legislative Record, and review of the affected ordinance, the Court finds the unconstitutional procedural provisions severable. Specifically, the remainder of the ordinance (the substantive zoning provisions) is sufficiently complete in itself, and the County likely would have adopted the amended zoning ordinance, even if it had foreseen some of its procedural provisions would be invalidated.

D. Spot Zoning

Deja Vu alleges the County enacted the zoning amendments "solely for the illegitimate purpose of forcing Plaintiffs to cease their authorized use of the

Property, rather than for any legitimate governmental purpose." (First Am. Compl., at 15.) Deja Vu moves for summary adjudication of this claim, and argues the County's zoning ordinance amendments are a clear case of "invalid spot zoning," which should be enjoined from enforcement. (Pls.' Joint Mot., at 31.) The motion is based on comments made by legislators before enacting the amendment, and on the fact Deja Vu is the only adult entertainment business which must relocate as a result of the amendment. Deja Vu acknowledges courts will not generally look to the motives of legislators in enacting an ordinance, but argues an exception applies "in cases involving spot zoning or discrimination against an individual or a particular land parcel." (*Id.*) In opposition, the County points to Deja Vu's evidence to argue the County did not have any particular adult entertainment business in mind when it enacted the amendment. The County presented no evidence of its own.

Deja Vu relies on California law, which recognizes a claim for discrimination against a particular parcel of property. *See, e.g., G & D Holland Constr. Co. v. City of Marysville,* 12 Cal.App.3d 989, 994, 91 Cal.Rptr. 227 (1970) ("The principle limiting judicial inquiry into the legislative body's police power objectives does not bar scrutiny of a quite different issue, that of discrimination against a particular parcel of property" and "the courts will give weight to evidence disclosing a purpose other than that appearing upon the face of the regulation""where 'spot zoning' or other restriction upon a particular property evinces a

discriminatory design against the property user"). However, Deja Vu does not allege a California spot zoning claim in its complaint. Instead, it alleges the amendment violates the freedom of speech provisions of the federal and California constitution. (First Am. Compl., at 20-21, 23.) As the spot zoning under California common law is not alleged in the complaint, and Deja Vu does not seek to amend it, its motion for summary judgment is denied to the extent it is based on this claim.

In the alternative, even if Deja Vu alleged a spot zoning claim under California law, the evidence it presented is insufficient to meet its burden as the moving party on summary judgment. Since Deja Vu would bear the burden of proof at trial as to its spot zoning claim, it "must make a showing sufficient for the Court to hold that no reasonable trier of fact could find other than for the moving party," and "must establish beyond peradventure all of the essential elements of the claim . . . to warrant judgment in its favor." *Pecarovich,* 272 F.Supp.2d at 985 (internal quotation marks, alterations and citations omitted); *see also C.A.R. Transp. Brokerage,* 213 F.3d at 480.

Deja Vu relies on two pieces of evidence in support of its spot zoning claim. First, it relies on a memorandum to the Board of Supervisors from two members wishing to add an item to an agenda "Getting Tough on Adult Entertainment Establishments." (Manicom Decl., Ex. 2, at 1.) The memorandum expresses dissatisfaction with the "current process" for "the citing of Adult Entertainment Establishments" because there is no

provision for "public input and notification." (*Id.* at 2.) The last paragraph states:

> The County must protect its citizens by creating the most restrictive ordinance possible within the boundaries of the law. While the Major Use Permit will allow for public input, the County must do everything within its authority to minimize the adverse impacts caused by Adult Entertainment Establishments. Rewriting the current ordinance will further protect unincorporated citizens.

(*Id.*) Deja Vu also cites comments by Supervisor Jacob during a meeting of the County Board of Supervisors on June 12, 2002:A few months ago it came to our attention that we had a defective ordinance in regards to adult entertainment establishments and that's why in March, the Board of Supervisors unanimously directed our staff and our legal counsel to come back with the toughest, the strictest ordinance and regulations for adult entertainment businesses that we could possibly have that would be upheld if challenged in a court of law. . . .

* * * * * *

These establishments, first of all, are not wanted in any of the communities and I think that is a foregone conclusion. But the courts have ruled that we must allow them in certain areas and we do know that we had a zoning ordinance that was invalid and therefore what that created is that every piece of property in every zone, whether it be residential,

commercial, industrial, was fair game for the establishment of an adult entertainment business. So, with what we have before us, in my view does meet the test of being the toughest, the most restrictive ordinance and regulations that we can have that have been court tested. I think that it is critical that our regulations stay within the boundaries of the law. They must be defensible. Otherwise the County is not able to enforce and to, bottom line, to protect our children and our communities. This will, I think, within the constitutional rights that are guaranteed by the courts, will protect our communities as much as possible. I think that the next most important thing is . . . to have aggressive enforcement. . . .

(LR, at 1931-38.)

Contrary to Deja Vu's assertion, these statements are not susceptible to an interpretation that would yield a scintilla of evidence or a reasonable inference the County was discriminating against it. *See Anderson,* 477 U.S. at 252, 106 S.Ct. 2505. To the contrary, the only reasonable interpretation is the County intended the zoning ordinance as amended to apply to all adult entertainment businesses. Although it appears Deja Vu has been affected disproportionately because it is the only business which must change its location, all adult entertainment businesses are subject to the same restrictions, and there is nothing to suggest Deja Vu was singled out. Consequently, Deja Vu has failed to meet its burden as the moving party on summary judgment with respect to a spot zoning claim under California law.

To the extent Deja Vu intended to base its motion consistently with its complaint on a spot zoning claim under the free speech provisio . of the First Amendment, *Renton* rejected a similar argument. The Supreme Court reversed a Ninth Circuit finding that the predominate concern with secondary effects of adult entertainment businesses was not enough to sustain the ordinance:

> According to the Court of Appeals, if "a *motivating factor* " in enacting the ordinance was to restrict respondents' exercise of First Amendment rights the ordinance would be invalid, apparently no matter how small a part this motivating factor may have played in the City Council's decision. This view of the law was rejected in *United States v. O'Brien,* the very case that the Court of Appeals said it was applying:
>
> "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. . . ."
>
> . . . .
>
> " . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."

Renton, 475 U.S. at 47-48, 106 S.Ct. 925 (internal citations omitted) (quoting *O'Brien,* 391 U.S. at 383-84, 88 S.Ct. 1673). For the foregoing reasons, Deja

Vu's motion for summary judgment on the spot zoning claim is denied.

VII. Licensing and Registration Requirements

In their respective operative complaints, all plaintiffs challenge on its face the constitutionality of those sections of the amended ordinance, which require all adult entertainment establishments and their owners, managers, performers, and employees to obtain a license, and which additionally require each entertainer and each manager to complete a registration form before starting work.[17] Plaintiffs contend these requirements constitute an unconstitutional restriction on the time, place, and manner of protected speech, and fail to provide for constitutionally-required procedural safeguards under the freedom of speech, press and expression provisions of the federal and California constitutions. The County moves for summary judgment of plaintiffs' challenges, and all plaintiffs cross-move for summary judgment of this claim.

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[17] According to plaintiffs, a "stay of enforcement" has been in effect as to the licensing requirements since the outset of this litigation. As a result, the licensing requirements have not actually been applied to them. Plaintiffs reserve the right to bring "as applied" challenges should a controversy arise in the future. (Pls.' Joint Mot., at 7 n. 4.)

Licensing requirements, such as the licensing provisions of the amended ordinance in this case, are considered prior restraints on speech, and are presumptively unconstitutional:

> A licensing scheme regulating [adult entertainment] is considered a prior restraint because the enjoyment of protected expression is contingent upon the approval of government officials. While prior restraints are not unconstitutional per se, any system of prior restraint comes to the courts bearing a heavy presumption against its constitutional validity. Like other regulations upon [adult entertainment], prior restraints can be imposed only if they are reasonable time, place and manner restrictions. In addition, an adult entertainment licensing scheme must contain at least two procedural safeguards. First, a decision to issue or deny a license must be made within a brief, specified and reasonably prompt period of time. Second, there must be prompt judicial review in the event a license is denied.

Clark v. City of Lakewood, 259 F.3d 996, 1005 (9th Cir.2001) (internal citations omitted). The instant cross-motions raise three issues pertaining to the licensing requirements: (1) whether plaintiffs have standing to challenge some of the provisions; (2) whether the licensing requirements constitute reasonable time, place, and manner restrictions; and (3) whether they provide sufficient procedural safeguards.

A. Standing

The County contends all plaintiffs lack standing to the extent they challenge the licensing provisions, which prohibit issuing a license to any minor or to any "officer, director, general partner or other person who will manage or participate directly in the decisions relating to management and control of the business" and who has been convicted of specified crimes. Any plaintiff challenging the licensing provisions on these grounds would have to show he or she was either a minor or convicted of a specified crime. *See FW/PBS,* 493 U.S. at 233-34, 110 S.Ct. 596. None of the plaintiffs made a showing along these lines. However, upon review of plaintiffs' papers, it is apparent they do not challenge the licensing provisions on these grounds. The County's standing argument is therefore inapplicable in this case.

B. Reasonable Time, Place, and Manner Restriction

Plaintiffs contend the licensing provisions are unconstitutional for three reasons: (1) they are unnecessarily burdensome and redundant; (2) they require disclosure of personal information which could potentially be made publicly available under California law; and (3) obtaining and maintaining a license depends on compliance with the hours-of-operation, interior configuration and zoning provisions, which plaintiffs maintain are unconstitutional. As to the last argument, the Court has determined above the hours-of-operation, interior configuration

and substantive zoning provisions are constitutional, and therefore rejects plaintiffs' challenge to the licensing and registration requirements to the extent it is based on those provisions.

1. Narrowly Tailored-Burdensome and Redundant

Plaintiffs argue the licensing requirements are broader and more onerous than justified by the significant governmental interests the County intended to address. The dispute is therefore focused on the issue whether the County's licensing requirements are "narrowly tailored" to "serve a substantial government interest" under *Renton,* 475 U.S. at 50-52, 106 S.Ct. 925.

The purpose of the amended licensing provisions in large part is to ensure no minors or individuals convicted of certain crimes, such as drug dealing, prostitution, rape, or pandering, work in adult entertainment establishments, to facilitate identification of witnesses and suspects connected to criminal activity found to be associated with adult entertainment businesses, and to curtail the spread of sexually-transmitted diseases. (*See* LR, at 142-45 [Ordinance No. 9479, § 21.1801(B)(1)-(25)].)

Plaintiffs first contend the requirements are unduly burdensome because each corporate officer, director, general partner or other person involved in management directly participating in management decisions or control of the business must personally

appear at the Sheriff's office to file the establishment license application. The County's opposing argument is although these individuals must each sign the application, only one must personally appear at the Sheriff's office. While this would be a sensible approach, it does not find support in the language of the ordinance:

> (F) . . . If a person who wishes to operate an adult entertainment establishment is other than an individual, each officer, director, general partner or other person who will manage or participate directly in the decisions relating to management and control of the business shall sign the application for a license as applicant. Each applicant must be qualified under Section 21.1804 and each applicant shall be considered a licensee if a license is granted.

(LR, at 149, 151 [Ordinance No. 9479, § 21.1803].) The definition of the term "licensee" includes "the individual or individuals listed as an applicant on the application for a[n] adult entertainment establishment license." (*Id.* at 147 [§ 21.1802(F)].) These provisions, read together, clearly indicate each officer, director, general partner or manager is an "applicant." Under subsection (C), each applicant must file the application in person:An applicant for an adult entertainment establishment license . . . shall file in person at the office of the County Sheriff a completed application made on a

form provided by the County Sheriff. The application shall be signed by the applicant.

(*Id.* at 149 [§ 21.1803(C)].)

The Ninth Circuit has not yet addressed the issue whether the requirement for each officer, director, general partner or manager to appear in person is unconstitutionally burdensome. Plaintiffs rely on two Seventh Circuit decisions, neither of which directly addresses the issue at hand. *Schultz v. City of Cumberland* invalidated certain portions of adult entertainment licensing provisions pertaining to employee and owner disclosures, because the court found them "redundant and unnecessary for Cumberland's stated purposes." 228 F.3d 831, 852 (7th Cir.2000). In addition, *Genusa v. City of Peoria* invalidated a licensing provision which required each person with an ownership interest in an adult entertainment business to file a separate license application. 619 F.2d 1203, 1216-17 (7th Cir.1980). The court found the purpose of the ordinance, enforcement of zoning provisions, did not support this requirement, and the purpose could be accomplished by one application filed on behalf of the business entity. *Id.* In this case, the ordinance does not require business owners to file separate applications, unless they also fall within the definition of "employee." It expressly provides for filing of one establishment application signed by all the owners. The issue is whether it is constitutionally permissible to require all the owners to appear in person at the Sheriff's office to file the establishment application.

As with any time, place, and manner restriction, it must be narrowly tailored to serve a substantial government interest. *Renton,* 475 U.S. at 50-52, 106 S.Ct. 925; *see also Kev,* 793 F.2d at 1060 (finding the license requirements served valid governmental purposes). In addition to the governmental interests the County intended to address, preventing minors and those who have recently been convicted of certain crimes from working on the premises, facilitating the identification of potential witnesses or suspects, and curtailing the spread of sexually-transmitted diseases (*see* LR, 142-45 [Ordinance No. 9479, § 21.1801(B)(1)-(25)]), the County also stated the purpose for the licensing provision itself:

> Adult Entertainment Establishments have operational characteristics that should be reasonably regulated in order to protect . . . substantial governmental concerns, A reasonable licensing procedure is an appropriate mechanism to place the burden of that reasonable regulation on the owners and the operators of the adult entertainment establishments. Further, such a licensing procedure will give an incentive on [*sic*] the operators to see that the adult entertainment establishment is run in a manner consistent with the health, safety and welfare of its patrons and employees, as well as the citizens of the County. It is appropriate to require reasonable assurances that the licensee is the actual operator of the adult entertainment establishment, in ultimate possession

> and control if the premises and activities occurring therein.
>
> (*Id.* at 144 [§ 21.1801(B)(17) & (18)].)

It is not clear how the requirement that each officer, director, general partner or manager appear in person to file the application advances the stated substantial government interests. The County offered no explanation. Since prior restraints are presumptively unconstitutional, *Clark,* 259 F.3d at 1005, the Court finds the County failed to present sufficient evidence to meet its burden in opposition to plaintiffs' summary judgment motion or in support of its own cross-motion with respect to this issue.

As to each officer, director, general partner or manager who falls under the definition of "employee," plaintiffs also contend it is unduly burdensome and redundant to require each to apply for an employee license, as well as collectively for an establishment license. The County contends plaintiffs' interpretation of the ordinance is not supported by a fair reading of the ordinance because the eligibility requirements for the two licenses are identical, and each officer, director, general partner or manager listed on the establishment license application is considered a "licensee."

While the employee license application does not call for any additional type of information than the establishment license application (*see* LR, at 144 [Ordinance No. 9479, § 21.1803(D)]), the amended ordinance clearly requires all persons falling within

the definition of "employee" to obtain an employee license:

> It shall be unlawful for any person to be an employee as defined in this Chapter, [*sic*] of an adult entertainment establishment in the County of San Diego without a valid adult entertainment establishment employee license.

(*Id.* at 149 [§ 21.1803(B)].) The fact an officer, director, general partner or manager is considered a "licensee" when an establishment license is issued to the business entity provides no relief, because the definition of "licensee" distinguishes between establishment and employee licensees:"Licensee" shall mean . . . the individual or individuals listed as an applicant on the application for a[n] adult entertainment establishment license. In case of an "employee," it shall mean the person in whose name the adult entertainment establishment employee license has been issued.

(*Id.* at 147 [§ 21.1802(F)] (emphasis added).)

Based on the express language of the ordinance, when the adult entertainment establishment is a business entity, each of its officers, directors, general partners or managers who falls within the definition of "employee" is required to sign the establishment application and submit a separate employee application. Since an employee license application calls for less information than an establishment license application (*see* LR, at 150 [Ordinance No. 9479,

§ 21.1803(D)]), the requirement to file an employee application is redundant. In addition, it provides another avenue to require each officer, director, general partner or manager who is an employee to appear in person at the Sheriff's office. (*Id.* at 149 [§ 21.1803(C)].) As discussed above, the stated purposes for the licensing provisions do not support this requirement.

Plaintiffs next contend the amended ordinance is not narrowly tailored because it "indiscriminately" requires every employee, whether they be a bartender, waitress, door host, parking valet, janitor or accounting clerk, to be licensed. The ordinance, however, is not "indiscriminate." It exempts from the licensing requirement persons who do not perform services on the premises and "person[s] exclusively on the premises for repair or maintenance of the premises or for the delivery of goods to the premises." (LR, at 146 [Ordinance No. 9479, § 21.1802(C)].) Requiring the remaining employees, who "perform [ ] any service on the premises of an adult entertainment establishment"(*id.*), to obtain a license is substantially related to the governmental interests the County intended to address. (*See* LR, at 142-45 [Ordinance No. 9479, § 21.1801(B)(1)-(25)].) Furthermore, the County is not required to establish the means it has chosen to address the secondary effects is the least restrictive or the most effective. A time, place, and manner regulation is considered narrowly tailored if the government shows it "serve[s] a substantial government interest," and affects that

category of businesses which produce the secondary effects. *Renton,* 475 U.S. at 50-52, 106 S.Ct. 925. Based on the foregoing, plaintiffs' argument fails as a matter of law because it is contradicted by the plain language of the ordinance.

Last, plaintiffs argue the licensing provisions are unduly burdensome because, in addition to the employee license, the amended ordinance requires each manager working on the premises and each performer to file a registration form with the Sheriff's office before beginning work. (LR, at 170-71 [Ordinance No. 9479, §§ 21.284.9, 21.285.1, 21.285.3].) According to plaintiffs, as a part of the registration process, the employees also provide their photographs and fingerprints. Requiring fingerprints and photographs is reasonably related to the substantial governmental interest of preventing crime. *See Deja Vu of Nashville v. Metro. Gov't of Nashville,* 274 F.3d 377, 393-95 (6th Cir.2001). This is one of the stated purposes of the amended ordinance. (LR, at 142 [Ordinance No. 9479, § 21.1802(B)(5), (21)-(24)].) Furthermore, the County made specific findings pertaining to performers and on-site managers which support the registration requirement:

> Certain employees of unregulated adult entertainment establishments defined in this ordinance as adult cabarets engage in higher incidence of certain types of illicit sexual behavior than employees of other establishments.
>
> * * * * * *

> The disclosure of certain information by those persons ultimately responsible for day-to-day operation and maintenance of the adult entertainment establishment, where such information is substantially related to the significant governmental interest in the operation of such uses, will aid in preventing the spread of sexually transmitted [*sic*] diseases and will prevent the further secondary effects of crime, blight, and dissemination of illegal obscenity, child pornography, and to minors, materials harmful to them.

(*Id.* at 145 [§ 21.1801(B)(2) & (21)].) The registration requirement is therefore permissible on its face. As to the burden of filing a registration and an employee license application, nothing precludes the performers and on-site managers from filing both at the same time. (*See id.* at 149, 170-71 [§§ 21.1803, 21.284.9, 21.285.1].) Since the requirement is narrowly tailored to advance a substantial government interest, and the burden is *de minimis,* the Court finds the requirement of filing a license application and registration would not make it more difficult to obtain a license so as to unreasonably diminish the inclination to apply. *See Kev,* 793 F.2d at 1060. The Court therefore finds plaintiffs failed to meet their burden as the moving party for summary judgment and in opposition to the County's cross-motion with respect to this issue.

In sum, the Court finds the licensing and registration requirements are narrowly tailored with the following two exceptions: (1) subsection (C) and (F) of

section 21.1803 are not narrowly tailored to the extent they require each "officer, director, general partner, or other person who will manage or participate directly in the decisions relating to management and control of the business" to appear in person at the Sheriff's office to file the establishment license application; and (2) subsection (B) of section 21.1803 is not narrowly tailored to the extent it requires the same category of individuals to also apply for an employee license, if they are employees as the term is defined in the ordinance.

None of the parties addresses severability of the offending provisions. Ordinance No. 9479 contains a severability clause. (LR, at 165 [§ 21.1826].) In addition, based on the Legislative Record and review of the affected ordinance, the Court finds the remainder of the ordinance, including the extensive substantive provisions and the non-offending licensing and registration provisions, is sufficiently complete in itself, and the County likely would have adopted the amended ordinance, even if it had foreseen some of its license application provisions would be invalidated. *See Barlow,* 72 Cal.App.4th at 1264, 85 Cal.Rptr.2d 752; *see also Kev,* 793 F.2d at 1060 n. 7. The Court therefore finds the unconstitutional portions of the licensing provision are severable, and therefore does not strike the ordinance in its entirety.

2. *Narrowly Tailored-Disclosure of Personal Information*

In addition, plaintiffs argue the County's new licensing requirements are unconstitutional because they require applicants to reveal certain personal information which may potentially be available to the public under California law, and therefore have a "chilling effect" on protected speech. The ordinance requires license applicants to disclose the following:

> 1. The applicant's full true name and any other names or aliases used in the preceding five (5) years.
>
> 2. Current business address or another mailing address of the applicant.
>
> 3. Written proof of age, in the form of a birth certificate or driver's license or other picture identification document issued by a governmental agency.
>
> 4. If the application is for an adult entertainment establishment license, the establishment name, location, legal description, mailing address and telephone number (if one currently exists) of the proposed adult entertainment establishment.
>
> 5. If the application is for an adult entertainment establishment license, the name and address of the statutory agent or other agent authorized to receive service of process.

> 6. A statement whether the applicant has been convicted or has pled guilty or nolo contendere to a specified criminal activity as defined in this ordinance, and, if so, the specified criminal activity involved, the date, place, and jurisdiction of each.
>
> (LR, at 150 [Ordinance No. 9479, § 21.1803(D)].)

Plaintiffs' "assertion that requiring disclosure of information regarding names, addresses, and telephone numbers to the county violates the First Amendment is essentially foreclosed by [the] decision in *Kev."See Dream Palace,* 384 F.3d at 1010. *Kev* upheld a licensing provision requiring entertainers to provide their name, address, phone number, birth date, and aliases, past and present, and business name and address where they intended to perform. 793 F.2d at 1059. The court found the required disclosures would not "discourage . . . a prospective dancer from performing" and did not "inhibit [ ] the ability or the inclination to engage in the protected expression." *Id.* at 1060; *see also Dream Palace,* 384 F.3d at 1010 (upholding licensing provision requiring disclosure of full true name, stage names, current residential address, and telephone number).[18]

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[18] Plaintiffs rely largely on *Schultz,* where the Seventh Circuit invalidated that portion of licensing requirements which called for disclosure of a residential address, recent color photograph, Social Security number, fingerprints, tax-identification number and driver's license information. 228 F.3d at 852. The Ninth Circuit, however, does not follow *Schultz* in this regard.

(Continued on following page)

However, *Dream Palace* granted the plaintiff's request for an injunction prohibiting the government from disclosing to the public pursuant to the state public record laws personal information such as residential addresses and telephone numbers because such information could be used by "aggressive suitors and overzealous opponents" to trace entertainers to their homes, causing them to choose not to apply for a permit or to engage in protected speech out of concern for their personal safety. 384 F.3d at 1012. The Ninth Circuit noted "[t]he chilling effect on those wishing to engage in First Amendment activity is obvious." *Id.*

The instant case, however, differs in a significant respect from *Dream Palace*. Nothing in the ordinance requires applicants to disclose their home address or telephone number, thus precluding the risk of aggressive suitors or overzealous opponents tracing them to their homes. Plaintiffs point to no other risk which could dissuade individuals from applying for a license.

With respect to the required disclosure of certain personal information to obtain a license, the Court finds plaintiffs failed to meet their burden in opposition to the County's summary judgment or in support of their cross-motion. Based on the foregoing, the

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In finding a similar licensing provision constitutional, *Dream Palace* acknowledged the Seventh Circuit's decision in *Schultz* was to the contrary. *See* 384 F.3d at 1010 n. 14. The Court therefore declines plaintiffs' invitation to follow *Schultz*.

Court does not reach the issue whether licensing information is available to the public under California law.

C. Procedural Safeguards

In its summary judgment motion the County contends the licensing provisions of the amended ordinance provide the procedural safeguards required by *FW/PBS*. To be constitutional, licensing provisions may not place "unbridled discretion in the hands of a government official or agency," "the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained," and "there must be the possibility of prompt judicial review in the event that the license is erroneously denied." *Id.* at 225, 228, 110 S.Ct. 596. Although plaintiffs acknowledge this standard in their opposition to the County's motion and in support of their cross-motion, they do not contend the licensing provisions fail to satisfy it.[19]

Under the County's licensing scheme, a license application may be denied based only on objective criteria: if an applicant is less than eighteen years of age, fails to provide certain information or falsely answers a question, has not paid the fee, was convicted of certain specified crimes, or the adult entertainment

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[19] To the extent plaintiffs intended this motion to challenge the procedural safeguards in their papers, they have waived this issue by failing to discuss it. *See Indep. Towers,* 350 F.3d at 929.

premises fail to meet interior configuration or zoning requirements of the ordinance. (LR, at 151-52 [Ordinance 9479, § 21.1804(A)(1)-(5)].) These requirements do not provide much discretion for denial of the license. Upon receipt of the application, a temporary license is immediately issued until the application is granted or denied. (*Id.* at 151.) This ensures the *status quo* remains pending the decision. The decision must be made within thirty days, at which time the applicant can immediately seek judicial review or appeal the decision to the County Hearing Officer. (*Id.* at 152, 163 [§§ 21.1804(B), 21.1824].) While review is pending, the applicant may continue to operate with a provisional license. (*Id.* at 164 [§ 21.1824].) Based on the review of the pertinent licensing provisions and lack of opposition from plaintiffs, the Court finds the County met its burden as the moving party for summary judgment with respect to this issue.

Conclusion

Based on the foregoing, plaintiffs' Joint Motion for Summary Judgement is **GRANTED IN PART AND DENIED IN PART**, and defendant's Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment is **GRANTED IN PART AND DENIED IN PART** as specified below.

As to Fantasyland Video, Inc. v. County of San Diego, case no. 02cv1909 LAB (RBB):

1. Fantasyland's motion for summary judgment with respect to its First Claim for Relief for declaratory and injunctive relief to prevent enforcement of the "Licensing Requirement" of Ordinance No. 9479 (as amended) is **GRANTED** to the extent the Court finds unconstitutional certain licensing and registration provisions of section 21.1803(B), (C) and (F).

Specifically, the Court finds: (1) subsections (C) and (F) are not narrowly tailored to the extent they require each "officer, director, general partner, or other person who will manage or participate directly in the decisions relating to management and control of the business" to appear in person at the Sheriff's office to file an adult entertainment establishment license application; and (2) subsection (E) is not narrowly tailored to the extent it requires the same category of individuals to also apply for an adult entertainment establishment employee license, if they are employees as the term is defined in the ordinance. The Court further finds these provisions severable from the remainder of the ordinance.

Accordingly, the County is **ENJOINED** from requiring each "officer, director, general partner, or other person who will manage or participate directly in the decisions relating to management and control of the business" to appear in person at the Sheriff's office to file an adult entertainment establishment license application. The County is further **ENJOINED** from requiring the same category of individuals to also apply for an adult entertainment

establishment employee license, if they are employees as the term is defined in the ordinance.

In all other respects, Fantasyland's summary judgment motion with respect to its First Claim for Relief is **DENIED**, and the County's summary judgment motion with respect to the same claim is **GRANTED**.

2. Fantasyland's motion for summary judgment with respect to its Second Claim for Relief for declaratory and injunctive relief to prevent enforcement of the "Hours of Operation Requirement" of Ordinance No. 9479 (as amended) is **DENIED**, and the County's summary judgment motion on the same claim is **GRANTED**.

3. Fantasyland's motion for summary judgment with respect to its Third Claim for Relief for declaratory and injunctive relief to prevent enforcement of the "Interior Configuration Regulations" of the Ordinance No. 9479 (as amended) is **DENIED**, and the County's summary judgment motion on the same claim is **GRANTED**.

4. Judgment has been entered on December 6, 2002 as to all remaining claims in this case. Clerk of Court is therefore directed to **ENTER FINAL JUDGMENT** in case no. 02cv1909 LAB (RBB).

As to Tollis, Inc. et al. v. County of San Diego, case no. 02cv2023 LAB (RBB)

1. Deja Vu's motion for summary judgment with respect to its First Claim for Relief for declaratory

and injunctive relief to prevent enforcement of the "License Requirements" of Ordinance No. 9479 (as amended) is **GRANTED** to the extent the Court finds unconstitutional certain licensing and registration provisions of section 21.1803(B), (C) and (F).

Specifically, the Court finds: (1) subsections (C) and (F) are not narrowly tailored to the extent they require each "officer, director, general partner, or other person who will manage or participate directly in the decisions relating to management and control of the business" to appear in person at the Sheriff's office to file an adult entertainment establishment license application; and (2) subsection (B) is not narrowly tailored to the extent it requires the same category of individuals to also apply for an adult entertainment establishment employee license, if they are employees as the term is defined in the ordinance. The Court further finds these provisions severable from the remainder of the ordinance.

Accordingly, the County is **ENJOINED** from requiring each "officer, director, general partner, or other person who will manage or participate directly in the decisions relating to management and control of the business" to appear in person at the Sheriff's office to file an adult entertainment establishment license application. The County is further **ENJOINED** from requiring the same category of individuals to also apply for an adult entertainment establishment employee license, if they are employees as the term is defined in the ordinance.

In all other respects, Deja Vu's summary judgment motion with respect to its First Claim for Relief is **DENIED**, and the County's summary judgment motion with respect to the same claim is **GRANTED**.

2. Deja Vu's motion for summary judgment with respect to its Second Claim for Relief for declaratory and injunctive relief to prevent enforcement of the "Hours of Operation Requirement" of Ordinance No. 9479 (as amended) is **DENIED**, and the County's summary judgment motion on the same claim is **GRANTED**.

3. Deja Vu's motion for summary judgment with respect to its Third Claim for Relief for declaratory and injunctive relief to prevent enforcement of the "Performance Restrictions" of Ordinance No. 9479 (as amended) is **DENIED**, and the County's summary judgment motion on the same claim is.

4. Deja Vu's motion for summary judgment with respect to its Fourth Claim for Relief for declaratory and injunctive relief to prevent enforcement of the "Zoning Amendment" of Ordinance No. 9469 (as amended) is **GRANTED** to the extent the Court finds unconstitutional certain procedural provisions of sections 6930(b)(1) and 7064.

Specifically, the Court finds sections 6930(b)(1) and 7064 fail to provide for procedural safeguards required by the First Amendment to the extent they allow for excessive time to make a decision whether to grant an administrative permit application. The

Court further finds these provisions severable from the remainder of the ordinance.

In all other respects, Deja Vu's summary judgment motion with respect to its Fourth Claim for Relief is **DENIED**, and the County's summary judgment motion with respect to the same claim is **GRANTED**.

5. In its Fifth Claim Alternative Relief for declaratory and injunctive relief to prevent enforcement of the "Zoning Amendment" Deja Vu alleges Ordinance No. 9469 (as amended) constitutes regulatory taking on the grounds it does not substantially advance legitimate state interests. Deja Vu is hereby **ORDERED TO SHOW CAUSE** why its Fifth Claim Alternative Relief should not be adjudicated in the same manner as its Fourth Claim for Relief. No later than ***July 5, 2005***, Deja Vu shall file a memorandum of points and authorities not to exceed five pages in length and supporting evidence, if any, in response to this order to show cause. The County shall file a responsive memorandum of points and authorities no more than five pages in length and any supporting evidence no later than *July 18, 2005*. Upon filing of the foregoing, the parties shall await further order of the Court.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

TOLLIS, INC., and 1560 N. MAGNOLIA AVE., LLC, Plaintiffs, vs. COUNTY OF SAN DIEGO, Defendant.	CASE NO. 02CV2023-LAB (RBB) **ORDER DISMISSING FIFTH CLAIM FOR ALTERNATIVE RELIEF** (Filed Jul. 12, 2005)

On June 14, 2005 the Court issued an order to show cause why Plaintiffs' Fifth Claim for Alternative Relief should not be summarily adjudicated. On July 5, 2005 Plaintiffs responded to the order to show cause, and on July 7, 2005 Defendant filed a response. Both sides agree the fifth cause of action is moot in light of *Lingle v. Chevron,* 544 U.S. ___, 125 S. Ct. 2074 (2005). **IT IS THEREFORE ORDERED** as follows:

1. Plaintiffs' Fifth Claim for Alternative Relief is **DISMISSED WITH PREJUDICE.**

2. As no further claims remain, Clerk of Court is directed to **ENTER FINAL JUDGMENT** in case no. 02cv 2023 LAB (RBB).

IT IS SO ORDERED.

DATED: 7-11-05 /s/ Larry A. Burns

HONORABLE LARRY ALAN BURNS
United States District Judge

United States District Court
SOUTHERN DISTRICT OF CALIFORNIA

Tollis Inc.

V.

County of San Diego

CORRECTED

JUDGMENT IN A CIVIL CASE

CASE NUMBER:
02cv2023 LAB(RBB)

(Filed Jul. 18, 2005)

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Plaintiff's fifth claim for alternative relief is dismissed with prejudice. As no further claims remain, the Clerk of Court is directed to Enter Final Judgment in case 02cv2023 LAB(RBB).....

.....

July 18, 2005
Date

W. Samuel Hamrick, Jr.
Clerk

J. Laviolette /s/ J. Laviolette
(By) Deputy Clerk

ENTERED ON July 18, 2005

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TOLLIS INC.; et al., Plaintiffs-Appellants, V. COUNTY OF SAN DIEGO, Defendant-Appellee.	No. 05-56300 D.C. No. CV-02-02023-LAB/RBB Southern District of California, San Diego ORDER (Filed Jan. 3, 2008)

Before: SILVERMAN, W. FLETCHER, and CLIFTON, Circuit Judges.

Appellant Tollis, Inc. and 1560 N. Magnolia Ave., LLC's "petition for rehearing with suggestion for rehearing en banc" is DENIED.

THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any

of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

(Underline indicates addition)
(~~Strike out~~ indicates deletion)

Ordinance No. 9469 (New Series)

AN ORDINANCE AMENDING THE SAN DIEGO COUNTY ZONING ORDINANCE RELATING TO ADULT ENTERTAINMENT ESTABLISHHMENTS (POD 02-03)

The Board of Supervisors of the County of San Diego ordains as follows:

Section 1. Findings.

A. The Board of Supervisors, in adopting this Ordinance, takes legislative notice of the existing and content of the following studies concerning the adverse secondary effects of adult entertainment businesses in the following cities: Garden Grove, California (1991); Tucson, Arizona (1990); Seattle, Washington, Department of Construction and Land Use (1989); Austin, Texas, Office of Land Development Services (1986); Okalahoma City, Oklahoma (1986); Indianapolis, Indiana, Department of Metropolitan Development (1984); Houston, Texas, City Council Report (1983); Beaumont, Texas (1982); Minnesota Crime Prevention Center, Inc., Minneapolis (1980); Phoenix, Arizona (1979); Los Angeles, California, Department of City Planning (1977); Amarillo, Texas, Planning Department (1977); Cleveland, Ohio (1977); Newport News, Virginia (1996); New York, New York (1994); Times Square, New York City (1994); and Whittier, California (1978). The Board of Supervisors finds that these are relevant to the

problems addressed by the County in enacting this Ordinance to regulate the adverse effects of adult businesses and more specifically finds that these studies provide convincing evidence that:

1. There is substantial evidence that an increase in crime tends to accompany, concentrate around, and be aggravated by adult businesses, including but not limited to an increase in the crimes of narcotics distribution and use, prostitution, pandering, and violence against persons and property. The studies from cities establish by convincing evidence that adult businesses that are not regulated as to operating standards often have a deleterious effect on nearby businesses and residential areas, causing, among other adverse secondary effects, an increase in crime and a decrease in property values.

2. Regulations for adult businesses should be developed to prevent deterioration and/or degradation of the vitality of the community before the problem exists, rather than waiting for problems to occur.

B. In developing this Ordinance, the Board of Supervisors is mindful of legal principles relating to regulation of adult businesses, and does not intend to suppress or infringe upon any expressive activities protected by the First Amendment of the United States and California Constitutions but instead desires to enact reasonable time, place, and manner regulations that address the adverse secondary effects of adult businesses. The Board has considered decisions of the United

States Supreme Court regarding local regulation of adult businesses, including but not limited to: *City of Erie v. Pap's A.M.* ("*Kandyland*") 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2002); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 (1986; and *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976); decisions of the United States Court of Appeals for the Ninth Circuit, including but not limited to: *Diamond v. City of Taft*, 215 F.3d 1052 (9th Cir. 2000), *cert. denied* 531 U.S. 1072 (2001); *Isbell v. City of San Diego*, 258 F.3d 1108 (9th Cir. 2001); *Young v. City of Simi Valley*, 216 F.3d 807 (9th Cir. 2000), *cert. denied* 531 U.S. 1104 (2001); *Lim v. City of Long Beach*, 217 F.3d 1050 (9th Cir. 2000), *cert. denied* 121 S.Ct. 1189 (2001); *Alameda Books v. City of Los Angeles*, 222 F.3d 719 (9th Cir. 2000), *cert. granted* 121 S.Ct. 1223 (2001); *Baby Tam & Co., Inc. v. City of Las Vegas* ("*Baby Tam I*"), 154 F.3d 1097 (9th Cir. 1998); *Baby Tam & Co., Inc. v. City of Las Vegas* ("*Baby Tam II*"), 199 F.3d 1111 (9th Cir. 2000); *Baby Tam & Co., Inc. v. City of Las Vegas* ("*Baby Tam III*"), 247 F.3d 1003 (9th Cir. 2001); *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524 (9th Cir. 1993), *cert. denied* 511 U.S. 1030 (1994); *Kev, Inc. v. Kitsap County*, 793 F.2d 1053 (9th Cir. 1986); *Colacurcio v. City of Kent*, 163 F.3d 545 (9th Cir. 1998), *cert. denied* 529 U.S. 1053 (2000); several California cases, including but not limited to: *Tily B., Inc. v. City of Newport Beach*, 69 Cal.App.4th

1 (1998); *City of National City v. Wiener*, 3 Cal.4th 832 (1993), *cert. denied* 510 U.S. 824; *People v. Superior Court (Lucero)* 49 Cal.3d 14 (1989); and *City of Vallejo v. Adult Books*, 167 Cal.App.3d 1169 (1985), *cert. denied* 475 U.S. 1064 (1986); and other federal cases, including but not limited to: *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248 (5th Cir. 1995); *Mitchell v. Commission on Adult Entertainment*, 10 F.3d 123 (3rd Cir. 1993); *Lakeland Lounge v. City of Jacksonville*, 973 F.2d (1255 (5th Cir. 1992), *cert. denied* 507 U.S. 1030 (1993); *International Eateries v. Broward County*, 941 F.2d 1157 (11th Cir. 1991), *cert. denied* 503 U.S. 920 (1992); and *Star Satellite, Inc. v. City of Biloxi*, 779 F.2d 1074 (5th Cir. 1986).

C. In addition to the findings and studies conducted in numerous cities regarding increases in crime rates, decreases in property values and the blighting of areas in which such businesses are located, the Board also takes Legislative notice of the facts recited in *Kev, Inc., v. Kitsap County*, 793 F.2d 1053 (9th Cir. 1986); *Colacurcio v. City of Kent*, 163 F.3d 545 (9th Cir. 1998); and *Tily B. v. City of Newport Beach* (1999) 69 Cal.App.4th 1, regarding how live adult entertainment facilities result in secondary effects such as prostitution, drug dealing, and other law enforcement problems. *See also BSA, Inc. v. King County*, 804 F.2d 1104, 1110-11 (9th Cir. 1986); *DLS, Inc. v. City of Chattanooga*, 894 F. Supp. 1140 (E.D. Tenn. 1995); *Parker v. Whitfield County*, 463 S.E.2d 116 (Ga. 1995); and *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248 (5th Cir. 1996).

D. The Board further finds the following, based in part upon its understanding of the documents, including but not limited to the San Diego County Sheriff's Report of November 9, 1998, the declarations of police officers in other jurisdictions setting forth their experiences, and judicial decisions in the public record that:

1. Evidence indicates that some dancers, models, entertainers, performers, and other persons who publicly perform specified sexual activities or publicly display specified anatomical areas in adult businesses (collectively referred to as "performers") have been found to engage in sexual activities with patrons of adult businesses on the site of adult businesses.

2. Evidence has demonstrated that performers employed by adult businesses have been found to offer and provide private shows to patrons who, for a price, are permitted to observe and participate with the performers in live sex shows.

3. Evidence indicates that performers at adult businesses have been found to engage in acts of prostitution with patrons of the establishment.

4. Evidence indicates that fully enclosed booths, individual viewing areas, and other small rooms whose interiors cannot be seen from public areas of the establishment regularly have been found to be used as locations for engaging in unlawful sexual activity.

5. The public health, safety, welfare, and morals of all persons in the County must be protected by the establishment of standards to diminish the possibility of infection of contagious diseases.

6. As a result of the above and the increase in incidents of HIV, AIDS, and hepatitis B, which are sexually transmitted or blood borne diseases, the County has a substantial interest in reducing the possibility for the occurrence of prostitution and unlawful sex acts at adult businesses in order to protect the health, safety, and well-being of its citizens. The County finds this is relevant to the experience of Encinitas and the need to regulate the secondary effects of adult businesses within the community.

Section 2. Purpose. It is the intent of this Zoning Ordinance amendment to add a notice and public hearing procedure, establish an appeal procedure and direct adult entertainment establishments to the industrial zoned areas of the County.

Section 3. Section 1100 (Definitions) of the Zoning Ordinance is hereby amended to read as follows:

Peep Show Device: Any device which displays still or moving images in a peep show booth which depict specified anatomical areas or specified sexual activities upon payment of a fee or other consideration. ~~It does not include a video game or similar electronic device which displays a computer created image on a screen or any similar "game of skill or amusement".~~

(Added by Ord. 8015 (N.S.) adopted 12-4-91)
(Amended by Ord. No. (N.S.) adopted)

~~Adult Motion Picture Arcade~~ Adult Arcade/Peep Show: Any place to which the public is permitted or invited wherein coin-operated or slug-operated or electronically, electrically or mechanically controlled still or motion picture machines, projectors, or other image-producing devices are regularly maintained to show images to five (5) or fewer persons per machine at any one time, and where the images so displayed are distinguished or characterized by ~~an~~ their emphasis ~~on depicting~~ upon matter exhibiting or describing specified sexual activities or specified anatomical areas.

(Added by Ord. No. 5840 (N.S.) adopted 7-30-80)
(Amended by Ord. No. (N.S.) adopted)

~~Adult Bookstore: An commercial establishment that which devotes more than 15 percent of the total floor area utilized for the display of books, magazines, periodicals, photographs, films, motion pictures, video cassettes, slides, tapes or records to display, rent, or sell the following:~~

~~1. Books, magazines, periodicals, or other printed matter, or photographs, films, motion pictures, video cassettes, slides, tapes, records, or other forms of visual or audio representations which are characterized by an emphasis upon the depiction or description of specified sexual activities or specified anatomical areas; or~~

~~2. Instruments, devices or paraphernalia which are designed for use in connection with specified sexual activities.~~

~~An adult bookstore does not include an establishment that displays, rents, or sells books, magazines, periodicals, photographs, films, motion pictures, video cassettes, slides, tapes or records as an incidental or accessory part of its principal stock-in-trade and does not devote more than 15 percent of the total floor area of the establishment to such display, rental or sale. An establishment that meets the 15 percent standards of this definition shall be deemed an adult bookstore which sells the specified items in 1. and 2. above as a regular and substantial course of conduct.~~

Adult Bookstore, Adult Novelty Store Adult Video Store: A commercial establishment which has a significant or substantial portion of its stock-in-trade or derives a significant or substantial portion of its revenues or devotes a significant or substantial portion of its interior business or advertising, or maintains a substantial section of its sales or display space for the sale or rental, for any form of consideration, of any one or more of the following:

a. Books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, compact discs, slides, or other visual representations which are characterized by their emphasis upon the exhibition or description of "specified sexual activities" or "specified anatomical areas";

b. Instruments, devices or parphenalia which are designed for use or marketed primarily for stimulation of human genital organs or for sadomasochistic use or abuse of the user or others.

(Added by Ord. No. 5840 (N.S.) adopted 7-30-80)
(Amended by Ord. No. 8015 (N.S.) adopted 12-4-91)
(Amended by Ord. No. (N.S.) adopted)

~~Adult Cabaret: A nightclub, bar, theater, restaurant or similar establishment which regularly features live performances which are distinguished or characterized by an emphasis on specified sexual activities or by exposure of specific anatomical areas and/or which regularly features films, motion pictures, video cassettes, slides or other photographic reproductions which are distinguished or characterized by an emphasis upon the depiction or description of specified sexual activities or specified anatomical areas for observation by patrons.~~

Adult Cabaret: A nightclub, bar, juice bar, theater, restaurant bottle club, or similar commercial establishment, whether or not alcoholic beverages are served, which regularly features: (a) persons who appear in a state of semi-nudity (nudity is prohibited per Chapter 18 of the Code of Regulatory Ordinances); or (b) films, motion pictures, videocassettes, slides, or other photographic reproductions which are characterized by their emphasis upon the exhibition or description of "specified sexual activities" or "specified anatomical areas".

(Added by Ord. No. 5840 (N.S.) adopted 7-30-80)
(Amended by Ord. No. (N.S.) adopted)

~~Adult Hotel or Motel: A hotel, motel or similar establishment offering public accommodations for any form of consideration which provides patrons with closed circuit television transmissions, films, motion pictures, video cassettes, slides or other photographic reproductions which are distinguished or characterized by an emphasis upon the depiction or description of specified sexual activities or specified anatomical areas.~~

Adult Motel: A motel, hotel, or similar commercial establishment which: (a) offers public accommodations for any form of consideration and which regularly provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by their emphasis upon the exhibition or description of "specified sexual activities" or "specified anatomical areas" and which regularly advertise the availability of such material by means of a sign visible from the public right of way or by means of any off-premises advertising, including but not limited to, newspapers, magazines, pamphlets or leaflets, radio or television, and (b) offers a sleeping room for rent for a period of less time than ten (10) hours.

(Added by Ord. No. 5840 (N.S.) adopted 7-30-80)
(Amended by Ord. No. (N.S.) adopted)

~~Adult Mini Motion Picture Theater: An establishment, with a capacity of not more than fifty (50)~~

~~persons, where, for any form of consideration, films, motion pictures, video cassettes, slides or similar photographic reproductions are shown, and in which a substantial portion of the total presentation time is devoted to the showing of material which is distinguished or characterized by an emphasis upon the depiction or description of specified sexual activities or specified anatomical areas for observation by patrons.~~

~~Adult Motion Picture Theater: An establishment, with a capacity of fifty (50) or more persons, where, for any form of consideration, films, motion pictures, video cassettes, slides or similar photographic reproductions are shown, and in which a substantial portion of the total presentation time is devoted to the showing of material which is distinguished or characterized by an emphasis on the depiction or description of specified sexual activities or specified anatomical areas for observation by patrons.~~

Adult Motion Picture Theater: A commercial establishment where films, motion pictures, videocassettes, slides, or similar photographic reproductions which are characterized by their emphasis upon the exhibition or description of "specified sexual activities" or "specified anatomical areas" are regularly shown for any form of consideration.

(Added by Ord. No. 5840 (N.S.) adopted 7-30-80)
(Amended by Ord. No. (N.S.) adopted)

Section 4. Section 2363 of the Zoning Ordinance is hereby amended to read as follows:

2363 PERMITTED USES SUBJECT TO LIMITATIONS.

The following use types are permitted by the C36 Use Regulations subject to the applicable provisions of Section 2980. The number in quotes following the use type refers to the subsection of Section 2980 which applies.

a. Residential Use Types.

Family Residential "1"

b. Commercial Use Types.

~~Adult Entertainment Establishments "19"~~
Agricultural Services "9"

(Amended by Ord. No. 5508 (N.S.) adopted 5-16-79)
(Amended by Ord. No. 5840 (N.S.) adopted 7-30-80)
(Amended by Ord. No. 6924 (N.S.) adopted 2-20-85)
(Amended by Ord. No. 7649 (N.S.) adopted 7-17-89)
(Amended by Ord. No. 8058 (N.S.) adopted 4-15-92)
(Amended by Ord. No. (N.S.) adopted)

Section 5. Section 2373 of the Zoning Ordinance is hereby amended to read as follows:

2373 PERMITTED USES SUBJECT TO LIMITATIONS.

The following use types are permitted by the C37 Use Regulations subject to the applicable provisions of Section 2980. The number in quotes following the use

type refers to the subsection of Section 2980 which applies.

a. Residential Use Types.

Family Residential "1"

b. Commercial Use Types.

~~Adult Entertainment Establishments "19"~~
Drug Paraphernalia Establishment "21"
Recycling Collection Facility, Small or Large "2"
Recycling Processing Facility, Light or Heavy "3"
Wholesaling, Storage and Distribution: Light "8"

(Amended by Ord. No. 5508 (N.S.) adopted 5-16-79)
(Amended by Ord. No. 5840 (N.S.) adopted 7-30-80)
(Amended by Ord. No. 7220 (N.S.) adopted 10-22-86)
(Amended by Ord. No. 7649 (N.S.) adopted 7-17-89)
(Amended by Ord. No. 8058 (N.S.) adopted 4-15-92)
(Amended by Ord. No. (N.S.) adopted)

Section 6. Section 2403 of the Zoning Ordinance is hereby amended to read as follows:

2403 PERMITTED USES SUBJECT TO LIMITATIONS.

The following use types are permitted by the C40 Use Regulations subject to the applicable provisions of Section 2980. The number in quotes following the use type refers to the subsection of Section 2980 which applies.

a. Residential Use Types.

Family Residential "1"

b. Commercial Use Types.

~~Adult Entertainment Establishments "19"~~
Construction Sales and Services "9"
Drug Paraphernalia Establishment "21"
Recycling Collection Facility, Small or Large "2"
Recycling Processing Facility, Light or Heavy "3"
Wholesaling, Storage and Distribution: Light "8"
(see Section 6300)

(Amended by Ord. No. 5508 (N.S.) adopted 5-16-79)
(Amended by Ord. No. 5840 (N.S.) adopted 7-30-80)
(Amended by Ord. No. 7649 (N.S.) adopted 7-17-89)
(Amended by Ord. No. 8058 (N.S.) adopted 4-15-92)
(Amended by Ord. No. (N.S.) adopted)

Section 7. Section 2500 of the Zoning Ordinance is hereby amended to read as follows:

2503 PERMITTED USES SUBJECT TO LIMITATIONS.

The following use types are permitted by the M50 Use Regulations subject to the applicable provisions of Section 2980. The number in quotes following the use type refers to the subsection of Section 2980 which applies.

a. Commercial Use Types.

Adult Entertainment Establishments "19"
Administrative and Professional Services "5"
Recycling Collection Facility, Small or Large "2"
Recycling Processing Facility, Light or Heavy "3"
Wholesaling, Storage and Distribution: Light "8"
(see Section 6300)

(Amended by Ord. No. 5508 (N.S.) adopted 5-16-79)
(Amended by Ord. No. 6924 (N.S.) adopted 2-20-85)
(Amended by Ord. No. 8058 (N.S.) adopted 4-15-92)
(Amended by Ord. No. (N.S.) adopted)

Section 8. Section 2520 of the Zoning Ordinance is hereby amended to read as follows:

2523 PERMITTED USES SUBJECT TO LIMITATIONS.

The following use types are permitted by the M52 Use Regulations subject to the applicable provisions of Section 2980. The number in quotes following the use type refers to the subsection of Section 2980 which applies.

a. Commercial Use Types.

Adult Entertainment Establishments "19"
Agricultural and Horticultural Sales "8" (all types)
Automotive and Equipment: Cleaning "8"
Automotive and Equipment: Repairs, Heavy Equipment "8"
Automotive and Equipment: Repairs, Light Equipment "8"
Automotive and Equipment: Sales/Rentals, Farm Equipment "9"
Automotive and Equipment: Sales/Rentals, Heavy Equipment "9"
Building Maintenance Services "8"
Construction Sales and Services "8" (see Section 6300)
Food and Beverage Retail Sales "10"
Gasoline Sales "12"
Recycling Collection Facility, Small or Large "2"

Recycling Processing Facility, Light or Heavy "3"
Wholesaling, Storage and Distribution: Light "8"
(see Section 6300)

(Amended by Ord. No. 5508 (N.S.) adopted 5-16-79)
(Amended by Ord. No. 6543 (N.S.) adopted 3-2-83)
(Amended by Ord. No. 6761 (N.S.) adopted 4-25-84)
(Amended by Ord. No. 6924 (N.S.) adopted 2-20-85)
(Amended by Ord. No. 8058 (N.S.) adopted 4-15-92)
(Amended by Ord. No. (N.S.) adopted)

Section 9. Section 2540 of the Zoning Ordinance is hereby amended to read as follows:

2543 PERMITTED USES SUBJECT TO LIMITATIONS.

The following use types are permitted by the M54 Use Regulations subject to the applicable provisions of Section 2980. The number in quotes following the use type refers to the subsection of Section 2980 which applies.

a. Commercial Use Types.

Adult Entertainment Establishments "19"
Agricultural Services "14"
Food and Beverage Retail Sales "10"
Recycling Collection Facility, Small or Large "2"
Recycling Processing Facility, Light or Heavy "3"
Wholesaling, Storage and Distribution:
Heavy "14"
Wholesaling, Storage and Distribution: Light "8"

(Amended by Ord. No. 5508 (N.S.) adopted 5-16-79)
(Amended by Ord. No. 7220 (N.S.) adopted 10-22-86)
(Amended by Ord. No. 8058 (N.S.) adopted 4-15-92)

(Amended by Ord. No. 9013 (N.S.) adopted 3-17-99)
(Amended by Ord. No. (N.S.) adopted)

Section 10. Section 2580 of the Zoning Ordinance is hereby amended to read as follows:

2583 PERMITTED USES SUBJECT TO LIMITATIONS.

The following use types are permitted by the M58 Use Regulations subject to the applicable provisions of Section 2980. The number in quotes following the use type refers to the subsection of Section 2980 which applies.

a. Commercial Use Types.

Adult Entertainment Establishments "19"
Agricultural Services "14"
Automotive and Equipment: Storage, Nonoperating Vehicles "9"
Food and Beverage Retail Sales "10"
Recycling Collection Facility, Small or Large "2"
Recycling Processing Facility, Light or Heavy "3"
Wholesaling, Storage and Distribution: Heavy "14"
Wholesaling, Storage and Distribution: Light "8"

(Amended by Ord. No. 5508 (N.S.) adopted 5-16-79)
(Amended by Ord. No. 7220 (N.S.) adopted 10-22-86)
(Amended by Ord. No. 8058 (N.S.) adopted 4-15-92)
(Amended by Ord. No. 9013 (N.S.) adopted 3-17-99)
(Amended by Ord. No. (N.S.) adopted)

Section 11. Section 2875 of the Zoning Ordinance is hereby amended to read as follows:

2875 USES SUBJECT TO A MAJOR USE PERMIT.

In addition to the Use Types permitted by Section 2872 through 2874, above, all other Use Types, with the exception of Adult Entertainment Establishments, are permitted by the S87 Use Regulations upon issuance of a Major Use Permit.

(Amended by Ord. No. 5508 (N.S.) adopted 5-16-79)
(Amended by Ord. No. (N.S.) adopted)

Section 12. Section 2980 of the Zoning Ordinance is hereby amended to read as follows:

2980 SUPPLEMENTAL LIMITATIONS ON USES

"19" Adult Entertainment Establishments. Subject to meeting the applicable provisions of the regulations and performance standards specified in Section 6930 and upon issuance of an administrative permit as specified in Section 6930.

(Amended by Ord. No. 5508 (N.S.) adopted 05-16-79)
(Amended by Ord. No. 5612 (N.S.) adopted 10-10-79)
(Amended by Ord. No. 5652 (N.S.) adopted 11-21-79)
(Amended by Ord. No. 5786 (N S.) adopted 06-04-80)
(Amended by Ord. No. 5840 (N.S.) adopted 07-30-80)
(Amended by Ord. No. 5935 (N.S.) adopted 11-19-80)
(Amended by Ord. No. 6743 (N.S.) adopted 01-11-85)
(Amended by Ord. No. 6924 (N.S.) adopted 02-20-85)
(Amended by Ord. No. 6983 (N.S.) adopted 07-03-85)
(Amended by Ord. No. 7649 (N.S.) adopted 07-17-89)
(Amended by Ord. No. 8058 (N.S.) adopted 04-15-92)

(Amended by Ord. No. 8166 (N.S.) adopted 10-21-92)
(Amended by Ord. No. (N.S.) adopted)

Section 13. Section 6930 of the Zoning Ordinance is hereby amended to read as follows:

6930 ADULT ENTERTAINMENT ESTABLISHMENTS.

a. Purpose and Intent. It is the purpose of this section to establish reasonable and uniform regulation to prevent the concentration of adult entertainment establishments, as defined herein, and to protect the public health, safety and welfare, within the unincorporated area of San Diego County. It is the intent of this section that the regulations be utilized to preserve the character of neighborhoods and property values and to deter the spread of crime and prevent problems of blight, deterioration, and public safety which often accompany and are brought about by the concentration and operation of adult entertainment establishments.

(Amended by Ord. No. 8015 (N.S.) adopted 12-04-91)

b. Permit required; Standards for Location.

1. No person shall cause or permit the establishment, operation, enlargement or transfer of ownership or control of any adult entertainment establishment without first obtaining an administrative permit therefore pursuant to ~~the Administrative Permit Procedure~~ this section from the Director, who shall be the administering agency. An application for such permit may be made where authorized by the applicable use regulations

and shall be acted upon by the Director following a public hearing within forty (40) days following receipt of the complete application pursuant to Section 65943 of the Government Code in accordance with the standards for location found in subsection b.2. below. The public hearing shall include notification to all properties within a 1,000-foot radius of the proposed site. The Director shall make his ruling within ten (10) days following the hearing. The Director shall make his decision based solely upon evidence relevant to the objective zoning and distance standards specified in the Zoning Ordinance.

2. ~~No~~ Th application for an administrative permit for an adult entertainment establishment shall be approved ~~if~~ unless said establishment is within 500 feet of any area zoned so as to permit the family residential use type as a primary use by right, or within 600 feet of any church, school, public playground or park ~~or recreational area~~, or within 1,000 feet of another such adult entertainment establishment. No variance shall be approved for an adult entertainment establishment to deviate from these distance standards. Establishment of a residential use, church, school, public playground or park located within the aforementioned distance restrictions subsequent to the filing of an application for a permit for an adult entertainment establishment shall not render the adult entertainment establishment a non-conforming use.

3. In the event that an Administrative Permit for an Adult Entertainment Establishment is appealed and the court has not decided the validity of the denial within thirty days after the petition is filed, the Director shall issue a temporary permit for an Adult Entertainment Establishment. The temporary permit shall remain in effect only until the court has rendered its opinion concerning the validity of the denial. Court challenges shall be governed by California Code of Civil Procedure § 1094.8.

c. Measure of Distance. Distance, without regard to intervening structures, shall be:

1. A straight line measured from the closest ~~exterior structural wall~~ property lines of any two adult entertainment establishments.

2. A straight line measured from the closest ~~exterior structural wall~~ property line of the adult entertainment establishment to the closest property line of a church, school, public playground, park, recreational area, or area zoned so as to permit the family residential use type as a primary use by right.

3. If any portion of a parcel falls within the distance criteria referenced in Section 6930, said parcel shall be prohibited from the development of any Adult Entertainment Establishment.

(Repealed and reenacted by Ord. No. 8015 (N.S.) adopted 12-04-91)
(Amended by Ord. No. (N.S.) adopted)

d. Activities. For the purpose of this ordinance, the following activities as defined in Sections following Section 1110 shall be deemed adult entertainment.

1. Adult ~~Motion Picture~~ Arcade
2. Adult Bookstore, Adult Novelty Store, Adult Video Store
3. Adult Cabaret
4. Adult Drive-In Theater
5. Adult Mini-Motion Picture Theater
6. Adult Model Studio
7. Adult Hotel or Motel
8. Adult Motion Picture Theater
9. Adult Theater
10. Body Painting Studio

~~11. Massage Parlor~~

11~~12~~. Sexual Encounter Establishment

12~~13~~. Any other business which involves Specified Sexual Activities or display of Specified Anatomical Areas.

(Amended by Ord. No. 8015 (N.S.) adopted 12-04-91)
(Amended by Ord. No. (N.S.) adopted)

~~e. Exceptions.~~

~~1. Notwithstanding Section 6852, an adult entertainment establishment which was lawfully established before January 3, 1992,~~

~~which is within 500 feet of any area zoned so as to permit the family residential use type as a primary use by right, or within 600 feet of any church, school, public playground, park or recreational area, or within 1,000 feet of another such adult entertainment establishment, shall be allowed to continue as a nonconforming use for a period not to exceed one year, at which time said use shall be discontinued. Any nonconforming adult entertainment establishment shall not be expanded, enlarged, extended or altered except that the use may be changed to a conforming use.~~

~~2. An adult entertainment establishment which was lawfully established before January 3, 1992, and is not within 500 feet of any area zoned so as to permit the family residential use type as a primary use by right, or within 600 feet of any church, school, public playground, park or recreational area, or within 1,000 feet of another such adult entertainment establishment, shall be subject to the nonconforming use and amortization provisions of subsection e.1. above if an area is zoned so as to permit the family residential use type as a primary use by right within 500 feet, or a church, school, public playground, park or recreational area is established within 600 feet, of said adult entertainment establishment. The one year amortization period set forth in subsection e.1. above shall commence on the effective date of the ordinance rezoning land so as to permit the family residential use type as a~~

~~primary use by right, or on the date the church, school, public playground, park or recreational area begins operation.~~

(Repealed and Reenacted by Ord. No. 8015 (N.S.) adopted 12-04-91)
(Amended by Ord. No. (N.S.) adopted)

e. Notwithstanding Section 6852, an adult entertainment establishment which was lawfully established before May 15, 2002 shall be allowed to continue as a nonconforming use for three (3) years. The Adult Entertainment Establishment shall have the right to apply for a six-month extension of this period upon a showing of financial hardship to the Director. In making a decision regarding an extension, the Director shall consider: 1) the availability of alternative locations, 2) the term of the lease; 3) the cost of any improvements that would only be of use to the Adult Business; and 4) the potential for other conforming uses to locate on the site.

Any nonconforming adult entertainment establishment shall not be expanded, enlarged, extended or altered except that the use may be changed to a conforming use.

f. As used in this section, "Establishing an Adult Entertainment Establishment" shall mean:

1. The opening or commencement of any such establishment as a new establishment; or

2. The conversion of an existing establishment, whether or not an adult entertainment establishment, to any of the adult entertainment establishments defined herein; or

3. The addition of any of the adult entertainment establishments defined herein to any other existing adult entertainment establishments; or

4. The relocation of any such establishment.

g. As used in this section, "Transfer of Ownership or Control" shall mean:

1. The sale, lease or sublease of such establishment; or

2. The transfer of securities which constitute a controlling interest in such establishment, whether by sale, exchange or similar means; or

3. The establishment of a trust, gift or other similar legal device which transfers the ownership or control of such establishment, except for transfers by bequest or other operation of law upon the death of the person possessing such ownership or control.

(Added by Ord. No. 5840 (N.S.) adopted 7-30-80)
(Amended by Ord. No. 6983 (N.S.) adopted 7-03-85)
(Amended by Ord. No. (N.S.) adopted)

h. Exception to Section 1019. Notwithstanding Section 1019, no application for an administrative permit or a building permit for an adult entertainment establishment shall be accepted or approved where the proposed use or facility would violate Section 6930 b.

(Amended by Ord. No. (N.S.) adopted)

Section 14. Section 7060 of the Zoning Ordinance is hereby amended to read as follows:

7060 DECISION AND NOTICE.

a. Action. Upon completion of his review and evaluation of an application for an Administrative Permit, the administering agency shall either:

1. Make such findings or other determination as is required by the pertinent sections of The Zoning Ordinance and approve the application, or

2. Notify the applicant of the changes and modifications required for approval of the application, or

3. Deny the Administrative Permit. The administrative agency shall deny the permit if:

i. The permit cannot be conditioned by adequate requirements to insure compliance with applicable regulations, or

ii. The application for the permit cannot reasonably be modified to conform to the applicable requirements.

b. Time Period. Within 60 days of receipt of a complete application for an administrative permit, the administering agency shall take such action as is specified in subsection a. of this section. The 60 day time period may be extended with the written consent of the applicant. ~~Except for applications for an administrative permit for an adult entertainment establishment pursuant to~~

~~Section 6930, failure of the administering agency to act within the specified time period or extension thereof, shall not affect the validity of the administering agency's decision. An application for an administrative permit for an adult entertainment establishment pursuant to Section 6930 shall be deemed approved if not denied by the Director within 60 days of the date such application is determined to be complete.~~ Such application shall be deemed complete, pursuant to Section 65943 of the Government Code, 30 days after submittal to the Department unless, prior to that date, either:

1. The applicant is notified in writing that the application is complete, in which case the 60 day processing period specified in this subsection shall begin to run from the date of such written notice, or

2. The applicant is notified in writing that the application is incomplete, which notice shall state with particularity the defects or omissions in the application, in which case the 60 day processing period specified in this subsection shall not begin to run until the date all requested information has been submitted to the Department.

(Amended by Ord. No. 8015 (N.S.) adopted 12-04-91)

c. Notice to Property Owners. When required by applicable sections of the Zoning Ordinance, the applicant shall either obtain and submit to the Director on a form provided by the Director written consent for issuance of the administrative permit from all owners of contiguous property

(including owners of parcels or lots across any street or alley from the site) or shall provide notice materials (as specified by the Director) with the permit application which shall be used by the Department to notify contiguous property owners of the receipt of said application. If required by applicable sections of the Zoning Ordinance, notice shall be given beyond such owners of contiguous property to any additional owners within the specified distance of the subject property.

d. Public Hearing. A public hearing shall not be held unless the administering agency determines that such hearing would be in the best interest of the County, or, if required by applicable sections of the Zoning Ordinance, where a hearing is requested by the applicant or other affected person.

e. Referral to Immigration and Naturalization Service. Applications filed pursuant to Section 4830 requesting to reduce the 150 foot setback along the International Border shall be referred to the local office of the immigration and Naturalization Service. In the event the INS expresses an intent to acquire all or part of the subject property the administering agency shall defer final action on the application for six months or until such time as the INS completes acquisition or abandons acquisition proceedings, whichever time period is less.

f. Defense of Lawsuits. As a condition of approval of an administrative permit, the applicant shall: (1) defend, indemnify and hold harmless the County, its agents, officers and employees from any claim, action or proceeding against the County, its

agents, officers or employees to attach, set aside, void or annul the administrative permit or any of the proceedings, acts or determinations taken, done or made prior to such decision granting such permit; and (2) reimburse the County, its agents, officers or employees for any court costs and attorney's fees which the County, its agents, officers or employees may be required by a court to pay as a result of such approval. At its sole discretion, the County may participate at its own expense in the defense of any such action, but such participation shall not relive the applicant of any obligation imposed by this condition.

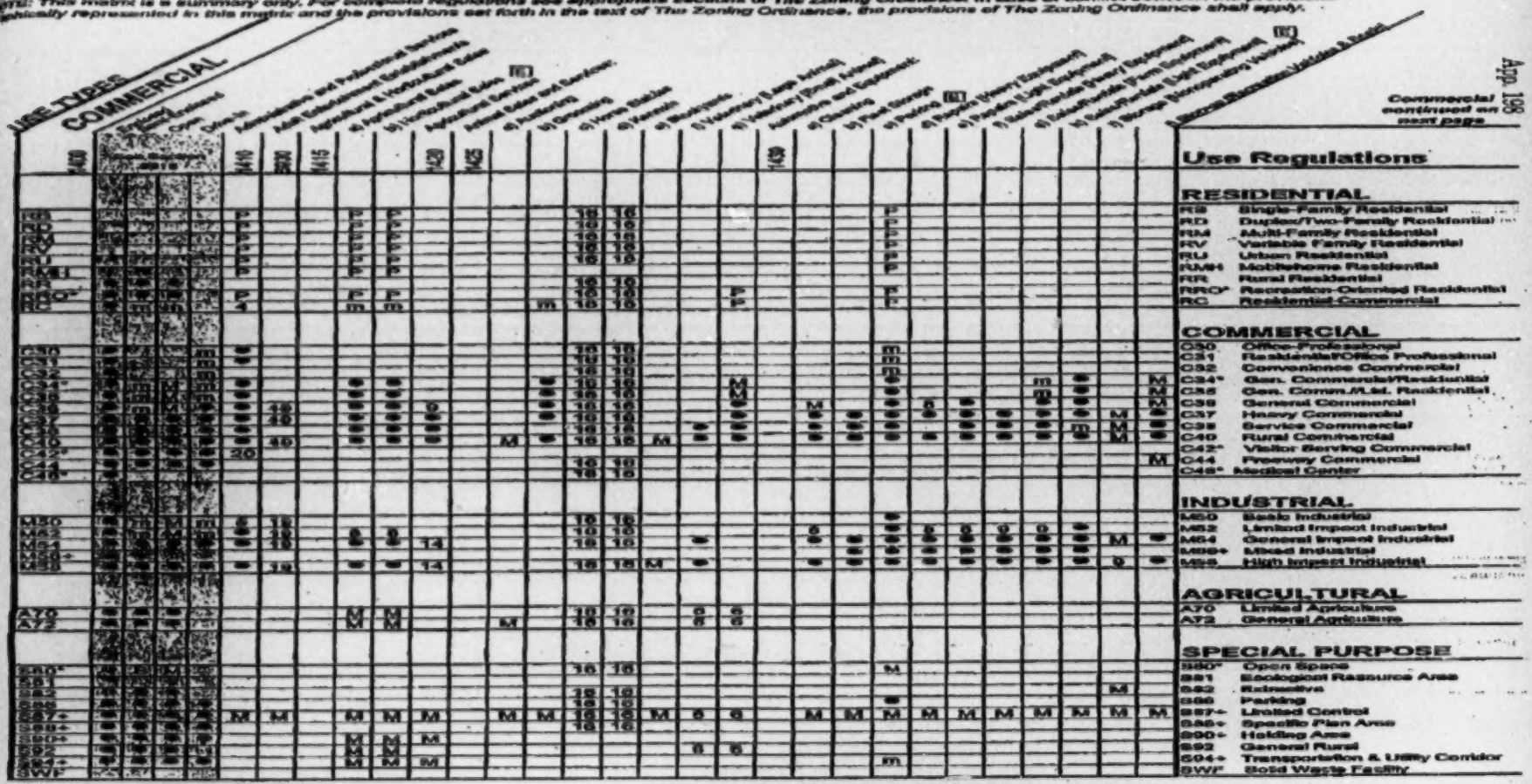
g. Notwithstanding the above, Administrative Permits for Adult Entertainment Establishments shall be governed by the requirements specified in Section 6930.

(Amended by Ord. No. 5508 (N.S.) adopted 5-16-79)
(Amended by Ord. No. 6586 (N.S.) adopted 5-18-83)
(Amended by Ord. No. 6691 (N.S.) adopted 11-30-83)
(Amended by Ord. No. 6782 (N.S.) adopted 5-16-84)
(Amended by Ord. No. 7110 (N.S.) adopted 4-02-86)
(Amended by Ord. No. 7246 (N.S.) adopted 12-10-86)
(Amended by Ord. No. 7306 (N.S.) adopted 5-20-87)
(Amended by Ord. No. 7740 (N.S.) adopted 3-28-90)
(Amended by Ord. No. 7782 (N.S.) adopted 07-25-90)
(Amended by Ord. No. (N.S.) adopted)

USE & ENCLOSURE MATRIX

SUMMARY PREPARED PURSUANT TO SECTIONS 2990 AND 6816

NOTE: This matrix is a summary only. For complete regulations see appropriate sections of The Zoning Ordinance. In case of conflict between the provisions schically represented in this matrix and the provisions set forth in the text of The Zoning Ordinance, the provisions of The Zoning Ordinance shall apply.



MATRIX LEGEND

- ● Permitted
- A Permitted by Administrative Permit
- S Permitted by Site Plan
- m Permitted by Minor Use Permit
- M Permitted by Major Use Permit
- P Permitted Only Within Planned Developments of 20 Acres or Larger
- 1-21 Subject to Limitations (See Section 2880)
- * May Be Subject to Site Plan Approval
- + Other Uses Not Shown on Matrix May be Permitted (See Text of Use Regulations)
- E Subject to Limitations (See Sections 2812 and 2818)
- E Exceptions to Enclosure Matrix (See Section 6814)

BEST AVAILABLE COPY

San Diego County Zoning Ordinance

6930 ADULT ENTERTAINMENT ESTABLISHMENTS.

a. Purpose and Intent. It is the purpose of this section to establish reasonable and uniform regulation to prevent the concentration of adult entertainment establishments, as defined herein, and to protect the public health, safety and welfare, within the unincorporated area of San Diego County. It is the intent of this section that the regulations be utilized to preserve the character of neighborhoods and property values and to deter the spread of crime and prevent problems of blight, deterioration, and public safety which often accompany and are brought about by the concentration and operation of adult entertainment establishments.

(Amended by Ord. No. 8015 (N.S.) adopted 12-04-91)

b. Permit required; Standards for Location.

1. No person shall cause or permit the establishment, operation, enlargement or transfer of ownership or control of any adult entertainment establishment without first obtaining an administrative permit therefor pursuant to the Administrative Permit Procedure from the Director, who shall be the administering agency. An application for such permit may be made where authorized by the applicable use regulations and shall be acted upon by the Director in accordance with the standards for location found in subsection b.2. below.

2. No application for an administrative permit for an adult entertainment establishment shall be approved if said establishment is within 500 feet of any area zoned so as to permit the family residential use type as a primary use by right, or within 600 feet of any church, school, public playground, park or recreational area, or within 1,000 feet of another such adult entertainment establishment. No variance shall be approved for an adult entertainment establishment to deviate from these distance standards.

(Repealed and reenacted by Ord. No. 8015 (N.S.) adopted 12-04-91)

c. Measure of Distance. Distance, without regard to intervening structures, shall be:

1. A straight line measured from the closest exterior structural wall of any two adult entertainment establishments.

2. A straight line measured from the closest exterior structural wall of the adult entertainment establishment to the closest property line of a church, school, public playground, park, recreational area, or area zoned so as to permit the family residential use type as a primary use by right.

(Amended by Ord. No. 8015 (N.S.) adopted 12-04-91)

d. Activities. For the purpose of this ordinance, the following activities as defined in Sections following Section 1110 shall be deemed adult entertainment.

1. Adult Motion Picture Arcade
2. Adult Bookstore
3. Adult Cabaret
4. Adult Drive-In Theater
5. Adult Mini-Motion Picture Theater
6. Adult Model Studio
7. Adult Hotel or Motel
8. Adult Motion Picture Theater
9. Adult Theater
10. Body Painting Studio
11. Massage Parlor
12. Sexual Encounter Establishment
13. Any other business which involves Specified Sexual Activities or display of Specified Anatomical Areas.

(Amended by Ord. No. 8015 (N.S.) adopted 12-04-91)

e. Exceptions.

1. Notwithstanding Section 6852, an adult entertainment establishment which was lawfully established before January 3, 1992, which is within 500 feet of any area zoned so as to permit the family residential use type as a primary use by right, or within 600 feet of any church, school, public playground, park or recreational area, or within 1,000 feet of another such adult entertainment establishment, shall be allowed to continue as a nonconforming use for a period not to

exceed one year, at which time said use shall be discontinued. Any nonconforming adult entertainment establishment shall not be expanded, enlarged, extended or altered except that the use may be changed to a conforming use.

2. An adult entertainment establishment which was lawfully established before January 3, 1992, and is not within 500 feet of any area zoned so as to permit the family residential use type as a primary use by right, or within 600 feet of any church, school, public playground, park or recreational area, or within 1,000 feet of another such adult entertainment establishment, shall be subject to the nonconforming use and amortization provisions of subsection e.1. above if an area is zoned so as to permit the family residential use type as a primary use by right within 500 feet, or a church, school, public playground, park or recreational area is established within 600 feet, of said adult entertainment establishment. The one year amortization period set forth in subsection e.1. above shall commence on the effective date of the ordinance rezoning land so as to permit the family residential use type as a primary use by right, or on the date the church, school, public playground, park or recreational area begins operation.

(Repealed and Reenacted by Ord. No. 8015 (N.S.) adopted 12-04-91)

f. As used in this section, "Establishing an Adult Entertainment Establishment" shall mean:

1. The opening or commencement of any such establishment as a new establishment; or

2. The conversion of an existing establishment, whether or not an adult entertainment establishment, to any of the adult entertainment establishments defined herein; or

3. The addition of any of the adult entertainment establishments defined herein to any other existing adult entertainment establishments; or

4. The relocation of any such establishment.

g. As used in this section, "Transfer of Ownership or Control" shall mean:

1. The sale, lease or sublease of such establishment; or

2. The transfer of securities which constitute a controlling interest in such establishment, whether by sale, exchange or similar means; or

3. The establishment of a trust, gift or other similar legal device which transfers the ownership or control of such establishment, except for transfers by bequest or other operation of law upon the death of the person possessing such ownership or control.

(Added by Ord. No. 5840 (N.S.) adopted 7-30-80)
(Amended by Ord. No. 6983 (N.S.) adopted 7-03-85)

h. Exception to Section 1019. Notwithstanding Section 1019, no application for an administrative permit or a building permit for an adult entertainment establishment shall be accepted or approved where the proposed use or facility would violate Section 6930 b.

(Added by Ord. No. 8015 (N.S.) adopted 12-04-91)

* * *

San Diego County Zoning Ordinance

SUPPLEMENTAL LIMITATIONS ON USES.

2980 LIMITATIONS ON PERMITTED USES.

The following limitations apply to the uses indicated by the corresponding number in quotes in the previous sections entitled "Permitted Uses Subject to Limitations."

* * *

"19" Adult Entertainment Establishments. Subject to meeting the applicable provisions of the regulations and performance standards specified in Section 6930 and upon issuance of an Administrative Permit as specified in Section 6930.

* * *

San Diego County Zoning Ordinance

MANUFACTURING AND INDUSTRIAL USE REGULATIONS

M50 BASIC INDUSTRIAL USE REGULATIONS

2500 INTENT.

The provisions of Section 2500 through Section 2509, inclusive, shall be known as the M50 Basic Industrial Use Regulations. The M50 Use Regulations are intended to create and preserve areas for basic manufacturing operations which evidence no or very low nuisance characteristics. Non-manufacturing uses are restricted to those providing essential support services to manufacturing plants and their personnel. Typically, the M50 Use Regulations would be applied in urban or suburban areas where nuisance characteristics involving noise, odor, traffic generation or unsightliness were undesired and where all uses (with certain exceptions) would be conducted entirely within enclosed buildings. Various applications of the M50 Use Regulations with appropriate development designators can create a community of industries in a high quality industrial park or preserve large tracts of land for basic manufacturing, assembling, or processing uses.

2502 PERMITTED USES.

The following use types are permitted by the M50 Use Regulations:

a. Civic Use Types.

Ambulance Services
Community Recreation
Essential Services
Fire Protection Services (see Section 6905)
Law Enforcement Services
Parking Services
Postal Services

b. Commercial Use Types.

Automotive and Equipment: Parking
Recycling Processing Facility, Wood and Green Materials
Research Services

c. Industrial Use Types.

Custom Manufacturing (see Section 6300)

d. Agricultural Use Types.

Horticulture (all types)
Tree Crops
Row and Field Crops
Packing and Processing: Limited
Packing and Processing: Winery
Packing and Processing: General

(Amended by Ord. No. 5508 (N.S.) adopted 5-16-79)
(Amended by Ord. No. 8175 (N.S.) adopted 11-18-92)

2503 PERMITTED USES SUBJECT TO LIMITATIONS.

The following use types are permitted by the M50 Use Regulations subject to the applicable provisions of Section 2980. The number in quotes following the use type refers to the subsection of Section 2980 which applies.

a. Commercial Use Types.

Adult Entertainment Establishments "19"
Administrative and Professional Services "5"
Recycling Collection Facility, Small or Large "2"
Recycling Processing Facility, Light or Heavy "3"
Wholesaling, Storage and Distribution: Light "8" (see Section 6300)

b. Industrial Use Types.

General Industrial "14"

(Amended by Ord. No. 5508 (N.S.) adopted 5-16-79)
(Amended by Ord. No. 6924 (N.S.) adopted 2-20-85)
(Amended by Ord. No. 8058 (N.S.) adopted 4-15-92)
(Amended by Ord. No. 9469 (N.S.) adopted 6-12-02)

2504 USES SUBJECT TO A MINOR USE PERMIT.

The following use types are permitted by the M50 Use Regulations upon issuance of a Minor Use Permit.

a. Civic Use Types.

Minor Impact Utilities
Small Schools

b. Commercial Use Types.

Convenience Sales and Personal Services
Eating and Drinking Establishments
Food and Beverage Sales

(Amended by Ord. No. 5508 (N.S.) adopted 5-16-79)
(Amended by Ord. No. 6654 (N.S.) adopted 9-21-83)
(Amended by Ord. No. 6782 (N.S.) adopted 5-16-84)

2505 USES SUBJECT TO A MAJOR USE PERMIT.

The following use types are permitted by the M50 Use Regulations upon issuance of a Major Use Permit.

a. Civic Use Types.

Administrative Services
Child Care Center
Clinic Services
Cultural Exhibits and Library Services
Lodge, Fraternal and Civic Assembly
Major Impact Services and Utilities
Religious Assembly

b. Commercial Use Types.

Wholesaling, Storage and Distribution:
Heavy (see Section 6300)

c. Extractive Use Types.

Site Preparation

(Amended by Ord. No. 5508 (N.S.) adopted 5-16-79)
(Amended by Ord. No. 6782 (N.S.) adapted 5-16-84)

M52 LIMITED IMPACT INDUSTRIAL USE REGULATIONS

2520 INTENT.

The provisions of Section 2520 through Section 2529, inclusive, shall be known as the M52 Limited Impact Industrial Use Regulations. The M52 Use Regulations are intended to create and preserve areas where manufacturing and industrial uses which evidence no or very low nuisance characteristics may locate. Non-industrial uses which support or are adjuncts to industrial uses and are compatible with such uses are permitted within the zone particularly administrative, sales, and services uses. Typically, the M52 Use Regulations would be applied in urban or suburban areas where nuisance characteristics involving noise, odor, traffic generation or unsightliness were undesired and where all uses (with certain exceptions) would be conducted entirely within enclosed buildings. Various applications of the M52 Use Regulations with appropriate development designators can create a community of industries in a high quality industrial park or a strip of low impact industrial uses.

2522 PERMITTED USES.

The following use types are permitted by the M52 Use Regulations:

a. Civic Use Types.

Ambulance Services
Community Recreation
Essential Services

Fire Protection Services (see Section 6905)
Law Enforcement Services
Parking Services
Postal Services

b. Commercial Use Types.

Administrative and Professional Services
Automotive and Equipment: Parking
Automotive and Equipment: Sales/Rental, Light Equipment
Business Equipment Sales and Services
Business Support Services
Communications Services
Laundry Services
Participant Sports and Recreation: Indoor
Research Services
Wholesaling, Storage and Distribution: Mini-Warehouses

c. Industrial Use Types.

Custom Manufacturing (see Section 6300)

d. Agricultural Use Types.

Horticulture (all types)
Tree Crops
Row and Field Crops
Packing and Processing "Limited"
Packing and Processing "Winery"
Packing and Processing "General"

(Amended by Ord. No. 5508 (N.S.) adopted 5-16-79)
(Amended by Ord. No. 6761 (N.S.) adopted 4-25-84)
(Amended by Ord. No. 8175 (N.S.) adopted 11-18-92)

2523 PERMITTED USES SUBJECT TO LIMITATIONS.

The following use types are permitted by the M52 Use Regulations subject to the applicable provisions of Section 2980. The number in quotes following the use type refers to the subsection of Section 2980 which applies.

a. Commercial Use Types.

Adult Entertainment Establishments "19"
Agricultural and Horticultural Sales "8" (all types)
Automotive and Equipment: Cleaning "8"
Automotive and Equipment: Repairs, Heavy Equipment "8"
Automotive and Equipment: Repairs, Light Equipment "8"
Automotive and Equipment: Sales/Rentals, Farm Equipment "9"
Automotive and Equipment: Sales/Rentals, Heavy Equipment "9"
Building Maintenance Services "8"
Construction Sales and Services "8" (see Section 6300)
Food and Beverage Retail Sales "10"
Gasoline Sales "12"
Recycling Collection Facility, Small or Large "2"
Recycling Processing Facility, Light or Heavy "3"
Wholesaling, Storage and Distribution: Light "8" (see Section 6300)

b. Industrial Use Types.

General Industrial "14"

(Amended by Ord. No. 5508 (N.S.) adopted 5-16-79)
(Amended by Ord. No. 6543 (N.S.) adopted 3-2-83)

(Amended by Ord. No. 6761 (N.S.) adopted 4-25-84)
(Amended by Ord. No. 6924 (N.S.) adopted 2-20-85)
(Amended by Ord. No. 8058 (N.S.) adopted 4-15-92)
(Amended by Ord. No. 9469 (N.S.) adopted 6-12-02)

2524 USES SUBJECT TO A MINOR USE PERMIT.

The following use types are permitted by the M52 Use Regulations upon issuance of a Minor Use Permit.

a. Civic Use Types.

Minor Impact Utilities
Small Schools

b. Commercial Use Types.

Convenience Sales and Personal Services
Eating and Drinking Establishments

(Amended by Ord. No. 5508 (N.S.) adopted 5-16-79)
(Amended by Ord. No. 6654 (N.S.) adopted 9-21-83)
(Amended by Ord. No. 6782 (N.S.) adopted 5-16-84)

2525 USES SUBJECT TO A MAJOR USE PERMIT.

The following use types are permitted by the M52 Use Regulations upon issuance of a Major Use Permit.

a. Civic Use Types.

Administrative Services
Child Care Center
Clinic Services
Cultural Exhibits and Library Services
Lodge, Fraternal and Civic Assembly

Major Impact Services and Utilities
Religious Assembly

b. Commercial Use Types.

Funeral and Interment Services: Cremating
Participant Sports and Recreation: Outdoor
Transient Habitation: Campground
(see Section 6450)
Wholesaling, Storage and Distribution: Heavy
(see Section 6300)

c. Extractive Use Types.

Site Preparation

(Amended by Ord. No. 5508 (N.S.) adopted 5-16-79)
(Amended by Ord. No. 6782 (N.S.) adopted 5-16-84)

M54 GENERAL IMPACT INDUSTRIAL USE REGULATIONS

2540 INTENT.

The provisions of Section 2540 through Section 2549, inclusive, shall be known as the M54 General Impact Industrial Use Regulations. The M54 Use Regulations are intended to create and preserve areas where manufacturing and industrial uses not having high nuisance characteristics may locate. Non-industrial uses which support industrial uses are permitted within the zone, particularly administrative, sales, and services uses. Typically, the M54 Use Regulations would be applied near rail and trucking facilities, or other locations where impacts associated with noise, odor and traffic would not impact on residential or

commercial areas. All outdoor storage areas would be subject to screening regulations. Various applications of the M54 Use Regulations with appropriate development designators can create a large transportation-dependent industrial center or a small, geographically isolated grouping of a few small scale industrial uses.

(Amended by Ord. No. 5508 (N.S.) adopted 5-16-79)

2542 PERMITTED USES.

The following use types are permitted by the M54 Use Regulations:

a. Civic Use Types.

Ambulance Services
Community Recreation
Essential Services
Fire Protection Services (see Section 6905)
Law Enforcement Services
Minor Impact Utilities
Parking Services
Postal Services

b. Commercial Use Types.

Administrative and Professional Services
Agricultural and Horticultural Sales (all types)
Animal Sales and Services: Veterinary, Large Animals
Automotive and Equipment: Cleaning
Automotive and Equipment: Fleet Storage
Automotive and Equipment: Parking
Automotive and Equipment: Repairs, Heavy Equipment

Automotive and Equipment: Repairs, Light Equipment
Automotive and Equipment: Sales/Rentals, Farm Equipment
Automotive and Equipment: Sales/Rentals, Heavy Equipment
Automotive and Equipment: Sales/Rentals, Light Equipment
Automotive and Equipment: Storage, Recreational Vehicles & Boats
Building Maintenance Services
Business Equipment Sales and Services
Business Support Services
Communications Services
Construction Sales and Services (See Section 6300)
Gasoline Sales
Laundry Services
Participant Sports and Recreation: Indoor
Recycling Processing Facility, Wood and Green Materials
Research Services
Wholesaling, Storage and Distribution: Mini-Warehouses (see Section 6300)

c. Industrial Use Types.

Custom Manufacturing

d. Agricultural Use Types.

Horticulture (all types)
Tree Crops
Row and Field Crops
Packing and Processing "Limited"
Packing and Processing "Winery"
Packing and Processing "General"

(Amended by Ord. No. 5508 (N.S.) adopted 5-16-79)
(Amended by Ord. No. 5786 (N.S.) adopted 6-4-80)
(Amended by Ord. No. 6543 (N.S.) adopted 3-2-83)
(Amended by Ord. No. 6924 (N.S.) adopted 2-20-85)
(Amended by Ord. No. 7220 (N.S.) adopted 10-22-86)
(Amended by Ord. No. 8058 (N.S.) adopted 4-15-92)
(Amended by Ord. No. 8175 (N.S.) adopted 11-18-92)
(Amended by Ord. No. 8283 (N.S.) adopted 7-21-93)

2543 PERMITTED USES SUBJECT TO LIMITATIONS.

The following use types are permitted by the M54 Use Regulations subject to the applicable provisions of Section 2980. The number in quotes following the use type refers to the subsection of Section 2980 which applies.

a. Commercial Use Types.

Adult Entertainment Establishments "19"
Agricultural Services "14"
Food and Beverage Retail Sales "10"
Recycling Collection Facility, Small or Large "2"
Recycling Processing Facility, Light or Heavy "3"
Wholesaling, Storage and Distribution: Heavy "14"
Wholesaling, Storage and Distribution: Light "8"

b. Industrial Use Types.

General Industrial "14"

(Amended by Ord. No. 5508 (N.S.) adopted 5-16-79)
(Amended by Ord. No. 7220 (N.S.) adopted 10-22-86)
(Amended by Ord. No. 8058 (N.S.) adopted 4-15-92)
(Amended by Ord. No. 9013 (N.S.) adopted 3-17-99)
(Amended by Ord. No. 9469 (N.S.) adopted 6-12-02)

2544 USES SUBJECT TO A MINOR USE PERMIT.

The following use types are permitted by the M54 Use Regulations upon issuance of a Minor Use Permit.

a. Civic Use Types

Small Schools

b. Commercial Use Types.

Convenience Sales and Personal Services
Eating and Drinking Establishments

(Amended by Ord. No. 5508 (N.S.) adopted 5-16-79)
(Amended by Ord. No. 6654 (N.S.) adopted 9-21-83)
(Amended by Ord. No. 6782 (N.S.) adopted 5-16-84)

2545 USES SUBJECT TO A MAJOR USE PERMIT.

The following use types are permitted by the M54 Use Regulations upon issuance of a Major Use Permit.

a. Civic Use Types.

Administrative Services
Child Care Center
Clinic Services
Cultural Exhibits and Library Services
Lodge, Fraternal and Civic Assembly
Major Impact Services and Utilities
Religious Assembly

b. Commercial Use Types.

Automotive and Equipment: Storage, Nonoperating Vehicles
Explosive Storage (see Section 6904)
Funeral and Interment Services: Cremating

Participant Sports and Recreation: Outdoor
Scrap Operations (see Section 6300)
Swap Meets
Transient Habitation: Campground
(see Section 6450)

c. Extractive Use Types.

Site Preparation

(Amended by Ord. No. 5508 (N.S.) adapted 5-16-79)
(Amended by Ord. No. 6782 (N.S.) adopted 5-16-84)
(Amended by Ord. No. 8283 (N.S.) adopted 7-21-93)
(Amended by Ord. No. 9013 (N.S.) adopted 3-17-99)

M56 MIXED INDUSTRIAL USE REGULATIONS

2560 INTENT.

The provisions of Section 2550 through 2579, inclusive, shall be known as the M56 Mixed Industrial Use Regulations, (M56 Use Regulations). The M56 Use Regulations will create an industrial area, and a maximum of five percent of each lot to be designated as support commercial area. The right to develop a support commercial area shall be transferable. The M56 Use Regulations will generally be applied to large areas of 100 or more acres, where a unified appearance can be created. A Specific Plan will be required prior to or concurrent with each rezone to address the availability of public facilities. The types of uses in the M56 Use Regulations will include industrial plants that are primarily engaged in the manufacturing, compounding, processing,

assembling, packaging, treatment, warehousing or fabrication of materials or products, and commercial use types necessary to support those uses. Site development will be reviewed for compliance with a Design review manual adopted for the area.

2561 SUPPORT COMMERCIAL AREA.

Support commercial areas shall be designated, and the transfer of the rights to develop support commercial area shall be subject to the following requirements.

a. Designation of Commercial Area. Each lot in the specific plan area shall be granted a maximum of five percent of commercial use. At the time of application for a building permit, the applicant shall apply for an administrative permit indicating what portion of the site will be reserved for commercial use, and the location of the parking to be reserved for the use. If no area is designated through the administrative permit process at the time the lot is initially developed, the owner retains the right to make such designation at a later date. Additionally, the applicant may relinquish the permit at any time by making an application for relinquishment to the Director. When an applicant has either chosen not to use the right to develop the commercial area of the property or has relinquished the administrative permit to develop the area as a commercial use, the right may be transferred to another property through the process described in subsection b of this section.

b. Transfer of Designated Commercial Area. Commercial development rights shall be transferable. Transfer shall only be to a site located within the contiguous area within which the M56 use regulation has been applied. The transfer shall not result in more than ten percent of any one site being utilized for support commercial development.

Prior to completing any transfers of development rights, the applicant shall obtain written approval from the Director. No purported transfer shall be of any force or effect without the Director's approval. The applicant shall notify the Department of the completion of the transfer on a form prescribed by the Department, and such notification shall be recorded. Failure to comply with the Department's requirements for notification shall be grounds for refusal to issue building permits.

2562 PERMITTED USES WITHIN THE INDUSTRIALLY DESIGNATED AREA

The following use types are permitted by the M56 Use Regulations within the industrially designated areas:

a. Civic Use Types.

Ambulance Services
Essential Services
Fire Protection Services
Law Enforcement Services
Minor Impact Utilities

Parking Services
Postal Services

b. Commercial Use Types.

Automotive and Equipment
- b) Fleet Storage
- c) Parking
- d) Repairs [Heavy Equipment]
- e) Repairs [Light Equipment]
- f) Sales/Rentals [Heavy Equipment]
- g) Sales/Rentals [Farm Equipment]
- h) Sales/Rental [Light Equipment]

Building Maintenance Services
Construction Sales and Services
Research Services
Wholesale Storage and Distribution
- a) Mini Warehouse
- b) Light
- c) Heavy

c. Industrial Use Types.

Custom Manufacturing
General Industrial

d. Agricultural Use Types.

Packing and Processing
- a) Limited
- b) Winery
- c) General
- d) Support

(Amended by Ord. No. 8175 (N.S.) adopted 11-18-92)

2563 PERMITTED USES WITHIN THE INDUSTRIALLY DESIGNATED AREAS THAT ARE SUBJECT TO LIMITATIONS.

The following use types are permitted by the M56 Use Regulations within the industrially designated areas, subject to the applicable provisions of Section 2980. The number in quotes following the use type refers to the subsection of Section 2980 which applies.

a. Commercial Use Types.

Eating and Drinking Establishments "10"
Food and Beverage Retail Sales "10"
Recycling Collection Facility, Small or Large "2"
Recycling Processing Facility, Light or Heavy "3"

(Amended by Ord. No. 8058 (N.S.) adopted 4-15-92)

2564 USES SUBJECT TO A MINOR USE PERMIT WITHIN THE INDUSTRIALLY DESIGNATED AREAS.

The following uses are permitted by the M56 Use Regulations in the industrially designated areas upon issuance of a Minor Use Permit.

a. Civic Use Types

Small Schools

2565 USES SUBJECT TO A MAJOR USE PERMIT WITHIN THE INDUSTRIALLY DESIGNATED AREAS.

The following uses are permitted by the M56 Use Regulations in the industrially designated areas upon issuance of a Major Use Permit.

a. Civic Use Types.

Administrative Services
Clinic Services
Cultural Exhibits and Library services
Child Care Center
Lodge Fraternal and Civic Assembly
Major Impact Services and Utilities
Religious Assembly

2566 PERMITTED USES WITHIN THE AREAS DESIGNATED FOR SUPPORT COMMERCIAL.

The following uses are permitted by the M56 Use Regulations within the commercially designated areas.

a. Civic Use Types.

Child Care Center
Essential Services
Law Enforcement Services
Minor Impact Utilities

b. Commercial Use Types.

Administrative and Professional Services
Agricultural and Horticultural Sales
a) Agricultural Sales
b) Horticultural Sales

Automotive and Equipment
    c) Parking
Building Maintenance Services
Business Equipment Sales and Services
Business Support Services
Communications Services
Eating and Drinking Establishments
Financial, Insurance and Real Estate
Food and Beverage Retail Sales
Gasoline Sales
Laundry Services
Participant Sports and Recreation
    a) Indoor
Recycling Collection Center
Repair Services [Consumer]
Research Services
Retail Sales
    a) General
Wholesale Storage and Distribution
    a) Mini Warehouse

c. Agricultural Use Types.

Horticultural
    a) Cultivation
    b) Storage
Tree Crops
Row and Field Crops
Packing and Processing
    a) Limited
    b) Support

(Amended by Ord. No. 8175 (N.S.) adopted 11-18-92)

M58 HIGH IMPACT INDUSTRIAL USE REGULATIONS

2580 INTENT.

The provisions of Section 2580 through Section 2589, inclusive, shall be known as the M58 High Impact Industrial Use Regulations. The M58 Use Regulations are intended to create and preserve areas where a full range of industrial uses with moderate to high nuisance characteristics may locate. Typically the M58 Use Regulations would be applied at locations where large land acreages were available and where the impacts associated with unsightliness, noise, odor, and traffic, and the hazards associated with certain industrial uses, would not impact on residential or commercial areas. Various applications of the M58 Use Regulations with appropriate development designators can create major heavy industrial centers or an area for a single, large industrial use.

(Amended by Ord. No. 5508 (N.S.) adopted 5-16-79)

2582 PERMITTED USES.

The following use types are permitted by the M58 Use Regulations:

a. Civic Use Types.

Ambulance Services
Community Recreation
Essential Services
Fire Protection Services (see Section 6905)
Law Enforcement Services
Minor Impact Utilities

Parking Services
Postal Services

b. Commercial Use Types.

Administrative and Professional Services
Agricultural and Horticultural Sales (all types)
Animal Sales and Services: Veterinary, Large Animals
Automotive and Equipment: Cleaning
Automotive and Equipment: Fleet Storage
Automotive and Equipment: Parking
Automotive and Equipment: Repairs, Heavy Equipment
Automotive and Equipment: Light Equipment
Automotive and Equipment: Sales/Rentals, Farm Equipment
Automotive and Equipment: Sales/Rentals, Heavy Equipment
Automotive and Equipment: Sales/Rentals, Light Equipment
Automotive and Equipment: Storage, Recreational Vehicles and Boats
Building Maintenance Services
Business Equipment Sales and Services
Business Support Services
Communications Services
Construction Sales and Services (See Section 6300)
Gasoline Sales
Laundry Services
Participant Sports and Recreation: Indoor
Recycling Processing Facilities, Wood and Green Materials
Research Services
Wholesaling, Storage and Distribution: Mini-Warehouses (see Section 6300)

c. Industrial Use Types.

Custom Manufacturing (see Section 6300)

d. Agricultural Use Types.

Horticulture (all types)
Tree Crops
Row and Field Crops
Packing and Processing (all types)

(Amended by Ord. No. 5508 (N.S.) adopted 5-16-79)
(Amended by Ord. No. 5786 (N.S.) adopted 6-4-80)
(Amended by Ord. No. 6543 (N.S.) adopted 3-2-83)
(Amended by Ord. No. 6924 (N.S.) adopted 2-20-85)
(Amended by Ord. No. 7220 (N.S.) adopted 10-22-86)
(Amended by Ord. No. 8058 (N.S.) adopted 4-15-92)
(Amended by Ord. No. 8175 (N.S.) adopted 11-18-92)
(Amended by Ord. No. 8318 (N.S.) adopted 10-27-93)

2583 PERMITTED USES SUBJECT TO LIMITATIONS.

The following use types are permitted by the M58 Use Regulations subject to the applicable provisions of Section 2980. The number in quotes following the use type refers to the subsection of Section 2980 which applies.

a. Commercial Use Types.

Adult Entertainment Establishments "19"
Agricultural Services "14"
Automotive and Equipment: Storage, Nonoperating Vehicles "9"
Food and Beverage Retail Sales "10"
Recycling Collection Facility, Small or Large "2"
Recycling Processing Facility, Light or Heavy "3"

Wholesaling, Storage and Distribution: Heavy "14"
Wholesaling, Storage and Distribution: Light "8"

b. Industrial Use Types.

General Industrial "14"

(Amended by Ord. No. 5508 (N.S.) adopted 5-16-79)
(Amended by Ord. No. 7220 (N.S.) adopted 10-22-86)
(Amended by Ord. No. 8058 (N.S.) adopted 4-15-92)
(Amended by Ord. No. 9013 (N.S.) adopted 3-17-99)
(Amended by Ord. No. 9469 (N.S.) adopted 6-12-02)

2584 USES SUBJECT TO A MINOR USE PERMIT.

The following use types are permitted by the M58 Use Regulations upon issuance of a Minor Use Permit.

a. Civic Use Types.

Small Schools

b. Commercial Use Types.

Convenience Sales and Personal Services
Eating and Drinking Establishments

(Amended by Ord. No. 5508 (N.S.) adopted 5-16-79)
(Amended by Ord. No. 6654 (N.S.) adopted 9-21-83)
(Amended by Ord. No. 6782 (N.S.) adopted 5-16-84)

2585 USES SUBJECT TO A MAJOR USE PERMIT.

The following use types are permitted by the M58 Use Regulations upon issuance of a Major Use Permit.

a. Civic Use Types.

Administrative Services
Child Care Center

Clinic Services
Cultural Exhibits and Library Services
Lodge, Fraternal and Civic Assembly
Major Impact Services and Utilities
Religious Assembly

b. Commercial Use Types.

Animal Sales and Services: Stockyard
Explosive Storage (see Section 6904)
Funeral and Interment Services: Cremating
Participant Sports and Recreation: Outdoor
Scrap Operations (see Section 6300)
Swap Meets

c. Industrial Use Types.

Heavy Industrial (see Section 6300)

d. Agricultural Use Types.

Animal Waste Processing (see Section 6902)

e. Extractive Use Types.

Mining and Processing
Site Preparation

(Amended by Ord. No. 5508 (N.S.) adopted 5-16-79)
(Amended by Ord. No. 6782 (N.S.) adopted 5-16-84)
(Amended by Ord. No. 7935 (N.S.) adopted 6-19-91)
(Amended by Ord. No. 8318 (N.S.) adopted 10-27-93)
(Amended by Ord. No. 9013 (N.S.) adopted 3-17-99)

San Diego County Zoning Ordinance

1110 GENERAL TERMS.

* * *

DEFINITIONS (A)

* * *

Adult Bookstore: An establishment that devotes more than 15 percent of the total floor area utilized for the display of books, magazines, periodicals, photographs, films, motion pictures, video cassettes, slides, tapes or records to display, rent, or sell the following:

1. Books, magazines, periodicals, or other printed matter, or photographs, films, motion pictures, video cassettes, slides, tapes, records, or other forms of visual or audio representations which are characterized by an emphasis upon the depiction or description of specified sexual activities or specified anatomical areas; or

2. Instruments, devices or paraphernalia which are designed for use in connection with specified sexual activities.

An adult bookstore does not include an establishment that displays, rents, or sells books, magazines, periodicals, photographs, films, motion pictures, video cassettes, slides, tapes or records as an incidental or accessory part of its principal stock-in-trade and does not devote more than 15 percent of the total floor area of the establishment to such display, rental or sale. An establishment that meets the 15 percent standards of this definition shall be deemed an adult

bookstore which sells the specified items in 1. and 2. above as a regular and substantial course of conduct.

* * *

San Diego County Zoning

ORDINANCE NO. 9827 (NEW SERIES)

AN ORDINANCE AMENDING THE ZONING ORDINANCE RELATING TO THE DEFINITION OF ADULT BUSINESSES

The Board of Supervisors of the County of San Diego ordains as follows:

Section 1. The purpose of this ordinance is to provide clarification regarding the term, "significant or substantial portion" as used in the definition of "Adult Bookstore, Adult Novelty Store Adult Video Store".

Section 2. Section 1110 of the Zoning Ordinance is hereby amended to revise the definition of "Adult Bookstore, Adult Novelty Store, Adult Video Store" in Definitions (A), to read as follows:

Adult Bookstore, Adult Novelty Store, Adult Video Store: A commercial establishment which has a significant or substantial portion of its stock-in-trade or derives a significant or substantial portion of its revenues or devotes a significant or substantial portion of its interior business or advertising, or maintains a substantial section of its sales or display space for the sale or rental, for any form of consideration, of any one or more of the following:

a. Books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, compact discs, slides, or other visual representations which are characterized

by their emphasis upon the exhibition or description of "specified sexual activities" or "specified anatomical areas";

b. Instruments, devices or paraphernalia which are designed for use or marketed primarily for stimulation of human genital organs or for sadomasochistic use or abuse of the user or others.

As used in this definition, the term "significant or substantial portion" means 25 percent or more.

Section 3. The Ordinance shall take effect and be in force 30 days after the date of its passage, and before the expiration of 15 days after its passage, a summary shall be published once with names of the members voting for and against the same in the *San Diego Daily Transcript*, a newspaper of general circulation published in the County of San Diego.

PASSED, APPROVED, AND ADOPTED on this 31st day of January, 2007.

JOHN J. SANSONE, County Counsel
County of San Diego
By THOMAS D. BUNTON, Senior Deputy
(State Bar No. 193560)
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Attorneys for Defendant County of San Diego

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

TOLLIS, INC. and 1560 N. MAGNOLIA AVE., LLC, Plaintiffs, v. THE COUNTY OF SAN DIEGO, Defendant.	Case No. 02 CV 2023 LAB (RBB) **COUNTY OF SAN DIEGO'S RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES**

PROPOUNDING PARTY:	Tollis, Inc. and 1560 N. Magnolia Ave., LLC, Plaintiffs
RESPONDING PARTY:	County of San Diego, Defendant
SET NO.:	One

Defendant County of San Diego (the "County") objects and responds to Plaintiffs Tollis, Inc.'s and 1560 N. Magnolia Ave., LLC's (collectively "Tollis")

First Set of Interrogatories to Defendant County of San Diego as follows:

PRELIMINARY STATEMENT

This response is made solely for the purpose of and in relation to this action. Each answer is given subject to all appropriate objections (including, but not limited to, objections covering competency, relevancy, materiality, propriety and admissibility). All such objections and grounds therefore are reserved and may be interposed at the time of trial.

The County has not yet completed its investigation of the facts relating to this action, has not yet completed discovery in this action, and has not yet completed its preparation for trial. Consequently, the following response is given without prejudice to the County's right to produce, at the time of trial, subsequently discovered information. This response must be construed as given on the basis of present knowledge.

GENERAL OBJECTIONS

Each and every interrogatory will be responded to subject to the general limitations and objections set forth below. These limitations and objections form a part of the response to each and every interrogatory and are set forth herein to avoid the repetition of restating them for each response. These general objections may be specifically referred to in a response

for purposes of clarity. However, failure to specifically incorporate a general objection should not be construed as a waiver of the general objection.

1. Because the County has not concluded discovery and its investigation in this action, and because it is anticipated that additional information will be obtained that might affect these responses, the County hereby reserves the right, but not the obligation, to amend, supplement or modify these responses and objections, and to rely upon any and all such information at trial or otherwise.

2. The county further states that it is responding to each interrogatory as it interprets and understands that interrogatory with respect to the issues framed in connection with this litigation. If Tollis interprets any part of an interrogatory that differs from the understanding of the County, the County reserves the right to supplement, amend, or modify its responses or objections.

3. The County objects to these interrogatories in their entirety on the grounds that they are unduly burdensome and oppressive, overbroad, premature, not relevant nor calculated to lead to the discovery of admissible evidence and otherwise improper.

4. The County objects to each interrogatory to the extent that it requests information which is protected from disclosure by the attorney-client privilege, the attorney work-product doctrine and/or any other applicable privilege.

5. The County objects to each interrogatory to the extent that it can be interpreted as calling for documents, data or other information containing or constituting factors known or opinions held by an expert who has been retained, specially employed or otherwise consulted in anticipation of litigation or preparation for trial.

6. The County objects to each interrogatory to the extent it requests disclosure of information that would violate any constitutional, statutory or common law privacy interest of any current or former employee or representative of the County.

7. The County objects to each interrogatory to the extent it seeks information irrelevant to the subject matter involved in the pending action and not reasonably calculated to lead to the discovery of admissible evidence.

8. The County objects to each interrogatory to the extent that it contains compound, conjunctive, and/or disjunctive questions and is not full and complete in and of itself, and is therefore prohibited by Rule 33 of the Federal Rules of Civil Procedure.

9. The County objects to each interrogatory to the extent it requests information that is equally available to Tollis as unduly burdensome, harassing, cumulative and duplicative.

10. The County objects to each interrogatory to the extent it seeks to impose obligations beyond those required by the Federal Rules of Civil Procedure.

11. The County does not concede the relevance, materiality, or admissibility of any information sought by any of these interrogatories or any response thereto. The County's responses are made subject to and without waiver of any objections as to the competency, relevancy, materiality, privilege or admissibility as evidence or for any other purpose, of any of the documents or information referred to or of the responses given herein, or of the subject matter thereof, in any proceeding, including trial of this action or any other subsequent proceeding.

Subject to the foregoing Preliminary Statement and General Objections and Limitations, County responds to these interrogatories as follows:

INTERROGATORY NO. 1:

If YOU contend that locating adult businesses in INDUSTRIAL ZONES instead of COMMERCIAL ZONES will regulate the adverse effects of adult businesses, as evidenced by the studies listed in Section 1.A. of the ZONING ORDINANCE AMENDMENT, state each and every fact which supports YOUR contention.

RESPONSE INTERROGATORY NO. 1:

The County believes that requiring adult entertainment establishments to be located in the industrial zones will reduce the negative secondary effects associated with adult entertainment establishments. Particularly, the County believes that blight, noise, traffic, and certain crimes including robbery, property

theft, assault and battery will be reduced. The industrial zones are generally located further from residential areas than are the industrial zones. Thus, requiring adult entertainment establishments to be located in industrial areas will reduce noise, traffic, and crime that effect residential property owners. In addition, decreased residential property values will be ameliorated by requiring adult entertainment establishments to be located in industrial zones. Further, most commercial establishments rely on customers to visit their premises. Many industrial facilities ship their products to middlemen and therefore fewer customers tend to visit their premises. Thus, requiring adult entertainment establishments to be located in industrial areas will reduce noise, traffic, and crime that effect commercial property owners and their patrons. In addition, decreased commercial property values will be ameliorated by requiring adult entertainment establishments to be located in industrial zones. Finally, fewer citizens tend to frequent industrial zones compared to commercial zones, particularly at night. Thus, the zoning change should reduce crimes such as assault, battery, robbery, and property theft by reducing the number of potential victims.

The County does not have the burden of citing evidence that establishes that requiring adult entertainment establishments to be located in the industrial zones has reduced negative secondary effects. *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 439 (2002) ("In effect, Justice Souter asks the city to

demonstrate, not merely by appeal to common sense, but also with empirical data, that its ordinance will successfully lower crime. Our cases have never required that municipalities make such a showing. . . .") (plurality opinion); *Id.* at 451-52 ("The Los Angeles City Council knows the streets of Los Angeles better than we do. It is entitled to rely on that knowledge; and if its inferences appear reasonable, we should not say that there is no basis for its conclusion.") (Kennedy J., concurring).

INTERROGATORY NO. 2:

If YOU contend that locating adult businesses in INDUSTRIAL ZONES instead of COMMERCIAL ZONES will ameliorate the increase in crimes of narcotics distribution and use, as evidenced by the studies listed in Section 1.A. of the ZONING ORDINANCE AMENDMENT, state each and every fact which supports YOUR contention.

RESPONSE INTERROGATORY NO. 2:

The County does not contend that requiring adult businesses to be located in the industrial zones rather than the commercial zones will ameliorate the increase in crimes of narcotics distribution and use.

INTERROGATORY NO. 3:

If YOU contend that locating adult businesses in INDUSTRIAL ZONES instead of COMMERCIAL ZONES will ameliorate the increase in the crimes of prostitution and pandering, as evidenced by the studies listed in Section L.A. of the ZONING ORDINANCE

AMENDMENT, state each and every fact which supports YOUR contention.

RESPONSE INTERROGATORY NO. 3:

The County does not contend that requiring adult businesses to be located in the industrial zones rather than the commercial zones will ameliorate the increase in the crimes of prostitution and pandering.

INTERROGATORY NO. 4:

If YOU contend that locating adult businesses in INDUSTRIAL ZONES instead of COMMERCIAL ZONES will ameliorate the increase in crimes of violence against persons and property, as evidenced by the studies listed in Section 1.A. of the ZONING ORDINANCE AMENDMENT, state each and every fact which supports YOUR contention.

RESPONSE INTERROGATORY NO. 4:

The County believes that criminal acts directed at third parties, such as assault, battery, property theft and rape will be reduced by requiring adult entertainment establishments to be located in industrial zones, rather than commercial zones. Most commercial establishments rely on customers to visit their premises. Many industrial facilities ship their products to middlemen. Therefore, fewer citizens tend to frequent industrial zones compared to commercial zones, particularly at night. Thus, the zoning change should reduce crimes such as assault, battery, robbery, and property theft, by reducing the number of potential victims.

The County does not have the burden of citing evidence that establishes that requiring adult entertainment establishments to be located in the industrial zones has reduced negative secondary effects. *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 439 (2002) ("In effect, Justice Souter asks the city to demonstrate, not merely by appeal to common sense, but also with empirical data, that its ordinance will successfully lower crime. Our cases have never required that municipalities make such a showing. . . .") (plurality opinion); *Id.* at 451-52 ("The Los Angeles City Council knows the streets of Los Angeles better than we do. It is entitled to rely on that knowledge; and if its inferences appear reasonable, we should not say that there is no basis for its conclusion.") (Kennedy, J., concurring).

INTERROGATORY NO. 5:

If YOU contend that locating adult businesses in INDUSTRIAL ZONES instead of COMMERCIAL ZONES will ameliorate any adverse secondary effect identified in the court decisions listed in Section 1.B. of the ZONING ORDINANCE AMENDMENT, identify such adverse secondary effect and state each and every fact which supports YOUR contention.

RESPONSE INTERROGATORY NO. 5:

The County believes that requiring adult entertainment establishments to be located in the industrial zones will reduce the negative secondary effects associated with adult entertainment establishments. Particularly, the County believes that blight, noise,

traffic, and certain crimes including robbery, property theft, assault and battery will be reduced. The industrial zones are generally located further from residential areas than are the industrial zones. Thus, requiring adult entertainment establishments to be located in industrial areas will reduce noise, traffic, and crime that effect residential property owners. In addition, decreased residential property values will be ameliorated by requiring adult entertainment establishments to be located in industrial zones. Further, most commercial establishments rely on customers to visit their premises. Many industrial facilities ship their products to middlemen and therefore fewer customers tend to visit their premises. Thus, requiring adult entertainment establishments to be located in industrial areas will reduce noise, traffic, and crime that effect commercial property owners and their patrons. In addition, decreased commercial property values will be ameliorated by requiring adult entertainment establishments to be located in industrial zones. Finally, fewer citizens tend to frequent industrial zones compared to commercial zones, particularly at night. Thus, the zoning change should reduce crimes such as assault, battery, robbery, and property theft by reducing the number of potential victims.

The County does not have the burden of citing evidence that establishes that requiring adult entertainment establishments to be located in the industrial zones has reduced negative secondary effects. *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 439

(2002) ("In effect, Justice Souter asks the city to demonstrate, not merely by appeal to common sense, but also with empirical data, that its ordinance will successfully lower crime. Our cases have never required that municipalities make such a showing. . . .") (plurality opinion); *Id.* at 451-52 ("The Los Angeles City Council knows the streets of Los Angeles better than we do. It is entitled to rely on that knowledge; and if its inferences appear reasonable, we should not say that there is no basis for its conclusion.") (Kennedy, J., concurring).

INTERROGATORY NO. 6:

If YOU contend that locating adult businesses in INDUSTRIAL ZONES instead of COMMERCIAL ZONES will reduce prostitution resulting from live adult entertainment facilities, as recited in the cases listed in Section 1.C. of the ZONING ORDINANCE AMENDMENT, state each and every fact which supports YOUR contention.

RESPONSE INTERROGATORY NO. 6:

The County does not contend that locating adult entertainment establishment in industrial zones rather than commercial zones will reduce incidents of prostitution that occur in and around adult entertainment establishments.

INTERROGATORY NO. 7:

If YOU contend that locating adult businesses in INDUSTRIAL ZONES instead of COMMERCIAL ZONES will reduce drug dealing resulting from live

adult entertainment facilities, as recited in the cases listed in Section 1.C. of the ZONING ORDINANCE AMENDMENT, state each and every fact which supports YOUR contention.

RESPONSE INTERROGATORY NO. 7:

The County does not contend that locating adult entertainment establishment in industrial zones rather than commercial zones will reduce the incidents of drug dealing that occur in and around adult entertainment establishments.

INTERROGATORY NO. 8:

If YOU contend that locating adult businesses in INDUSTRIAL ZONES instead of COMMERCIAL ZONES will reduce other law enforcement problems resulting from adult entertainment facilities, as recited in the cases listed in Section 1.C. of the ZONING ORDINANCE AMENDMENT, identify those other law enforcement problems and state each and every fact which supports YOUR contention.

RESPONSE INTERROGATORY NO. 8:

The County believes that criminal acts directed at third parties, such as assault, battery, property theft and rape will be reduced by requiring adult entertainment establishments to be located in industrial zones, rather than commercial zones. Most commercial establishments rely on customers to visit their premises. Many industrial facilities ship their products to middlemen. Therefore, fewer citizens tend to frequent industrial zones compared to commercial

zones, particularly at night. Thus, the zoning change should reduce crimes such as assault, battery, robbery, and property theft, by reducing the number of potential victims.

The County does not have the burden of citing evidence that establishes that requiring adult entertainment establishments to be located in the industrial zones has reduced negative secondary effects. *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 439 (2002) ("In effect, Justice Souter asks the city to demonstrate, not merely by appeal to common sense, but also with empirical data, that its ordinance will successfully lower crime. Our cases have never required that municipalities make such a showing. . . .") (plurality opinion); *Id.* at 451-52 ("The Los Angeles City Council knows the streets of Los Angeles better than we do. It is entitled to rely on that knowledge; and if its inferences appear reasonable, we should not say that there is no basis for its conclusion.") (Kennedy, J., concurring).

INTERROGATORY NO. 9:

If YOU contend that locating adult businesses in INDUSTRIAL ZONES instead of COMMERCIAL ZONES will diminish the possibility of infection of contagious diseases, as stated in the findings of Section 1.D.5 of the ZONING ORDINANCE AMENDMENT, state each and every fact which supports YOUR contention.

RESPONSE INTERROGATORY NO. 9:

The County does not contend that locating adult entertainment establishment in industrial zones rather than commercial zones will reduce the spread of sexually transmitted diseases that occur at adult entertainment establishments.

INTERROGATORY NO. 10:

If YOU, contend that locating adult businesses in INDUSTRIAL ZONES instead of COMMERCIAL ZONES will reduce the possibility for the occurrence of prostitution of adult businesses, as stated in findings of Section 1.D.6 of the ZONING ORDINANCE AMENDMENT, state each and every fact which supports YOUR contention.

RESPONSE INTERROGATORY NO. 10:

The County does not contend that locating adult entertainment establishment in industrial zones rather than commercial zones will reduce incidents of prostitution that occur at adult entertainment establishments.

INTERROGATORY NO. 11:

If YOU, contend that locating adult businesses in INDUSTRIAL ZONES instead of COMMERCIAL ZONES will reduce the possibility for the occurrence of unlawful sex acts at adult businesses, as stated in findings at Section I.D.6 of the ZONING ORDINANCE AMENDMENT, state each and every fact which supports YOUR contention.

RESPONSE INTERROGATORY NO. 11:

The County does not contend that locating adult entertainment establishment in industrial zones rather than commercial zones will reduce unlawful sex acts that occur at adult entertainment establishments.

INTERROGATORY NO. 12:

If YOU, contend that locating adult businesses in INDUSTRIAL ZONES instead of COMMERCIAL ZONES is relevant to the experience of Encinitas, as stated in the findings at Section 1.D.6 of the ZONING ORDINANCE AMENDMENT, state each and every fact which supports YOUR contention.

RESPONSE INTERROGATORY NO. 12:

At pages 1748 and 1749 of the Legislative Record is a letter from Sheriff's Captain Octavia Parker to the Mayor and City Counsel of the City of Encinitas discussing the negative secondary effects associated with adult entertainment establishments like Tollis. The County believes that requiring adult entertainment establishments to be located in the industrial zones will reduce the negative secondary effects associated with adult entertainment establishments including, but not limited to, blight, reduced commercial and residential property values, noise, traffic and crime.

* * *

INTERROGATORY NO. 17:

If YOU contend that Section 21.1809 of the REGULATORY ORDINANCE requiring adult entertainment establishments, except adult hotels/motels, to close between 2:00 a.m. and 6:00 a.m. of each day will ameliorate, any deleterious effect attributable to adult entertainment establishments, identify such deleterious effect(s) and state each and every fact which supports YOUR contention.

RESPONSE INTERROGATORY NO. 17:

The County believes that requiring adult entertainment establishments to be closed during the hours of 2:00 a.m. and 6:00 a.m. will reduce negative secondary effects associated with adult entertainment establishments. Particularly, the County believes that noise, traffic, and crime will be reduced by the hours closing requirement contained in the County's ordinance. Criminals often operate during late night/early morning hours when witnesses and police are less likely to be present. Further, noise generated by patrons of adult entertainment establishments (including noise caused by vehicles and individuals entering, exiting and loitering around such establishments) cause much greater disturbance during the late night/early morning hours when people are sleeping. In addition, because adult entertainment establishments will be closed for four hours per day, police can provide greater protection during the remainder of the day, thereby reducing crime during this period as well.

The County does not have the burden of citing evidence that establishes that requiring adult entertainment establishments to be closed between the hours of 2:00 a.m. and 6:00 a.m. has reduced negative secondary effects. *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 439 (2002) ("In effect, Justice Souter asks the city to demonstrate, not merely by appeal to common sense, but also with empirical data, that its ordinance will successfully lower crime. Our cases have never required that municipalities make such a showing. . . .") (plurality opinion); *Id.* at 451-52 ("The Los Angeles City Council knows the streets of Los Angeles better than we do. It is entitled to rely on that knowledge; and if its inferences appear reasonable, we should not say that there is no basis for its conclusion.") (Kennedy, J., concurring).

* * *

JOHN J. SANSONE
County Counsel

DATED: 6/7/04 By /s/ Thomas D. Bunton
THOMAS D. BUNTON,
Senior Deputy
Attorneys for Defendant
County of San Diego

VERIFICATION

I, DAVID HULSE, am Land Use Chief for the Department of Planning and Land Use of the County of San Diego, the defendant in the above-entitled action, and am authorized to make this verification

on its behalf. I have read the foregoing **COUNTY OF SAN DIEGO'S RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES** and know the contents thereof.

I certify that the same is true of my own knowledge, as to the County's responses to Interrogatories, except as to the matters which are therein stated upon information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 7th day of June 2004, at San Diego, California.

/s/ David Hulse
DAVID HULSE

No. 07-1258

FILED
APR 25 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

TOLLIS, INC., and 1560 N. MAGNOLIA AVE., LLC,

Petitioners,

vs.

COUNTY OF SAN DIEGO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is an adult business that is required to relocate under the terms of a municipal zoning ordinance denied a reasonable opportunity to open and operate where there are 68 parcels potentially available for use by an adult business and only one adult business needs to relocate under the ordinance?

2. Did Associate Justice Anthony M. Kennedy's concurring opinion in *City of Los Angeles v. Alameda Books,* 535 U.S. 425 (2002) (plurality opinion), overrule long-standing Supreme Court precedent establishing that a municipality does not bear the burden of showing that a relocation site for an adult business is actually available for purchase or lease?

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Respondent County of San Diego (the "County") respectfully submits this opposition to the Petition for a Writ of Certiorari filed by Tollis, Inc. and 1560 N. Magnolia Ave., LLC.

INTRODUCTION/SUMMARY OF ARGUMENT

Under the County's amended Zoning Ordinance, adult businesses such as Déjà Vu[1] must relocate to specified industrial zones. Déjà Vu is currently operating in a commercial zone and is the ***only*** adult business that needs to relocate. The district court found that there was no disputed issue of material fact that there are 68 sites/parcels that are available where Déjà Vu could relocate its business. ***Déjà Vu did not challenge the district court's finding on appeal.***

A large portion of Déjà Vu's Petition for a Writ of Certiorari is spent arguing that this Court's precedents have not clearly defined the precise factors courts should consider in determining whether a zoning ordinance has denied an adult business "a reasonable opportunity to open and operate. . . ." *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54

[1] The business that operates at 1560 N. Magnolia Ave. in the unincorporated County of San Diego is called "Déjà Vu." *Fantasyland Video, Inc. v. County of San Diego*, 373 F. Supp. 2d 1094, 1101 (S.D. Cal. 2005). The County will refer to Petitioners as Déjà Vu in this Opposition.

(1986). Even if this were true (which it is not), this case would not be an appropriate vehicle for the Court to expand on the "alternative avenues of communication" prong of the *Renton* test. *Id.* at 50. Whatever the precise factors that a court might consider, it is clear that a single adult business that can choose from 68 potentially available sites has not been denied a reasonable opportunity to open and operate.

Next, Déjà Vu argues that Associate Justice Anthony M. Kennedy's concurring opinion in *Alameda Books*, 535 U.S. 425, overrules the holding in *Renton* that a local government does not bear the burden of showing that the specific parcels of property where an adult business may locate are actually available for purchase or lease. Déjà Vu contends that "it seems apparent that what Justice Kennedy contemplated when imposing the 'how speech will fare' analysis was to require the examination of whether there were relocation sites that an adult business could actually purchase or lease." (Déjà Vu Brief, at 27.) Justice Kennedy, however, specifically disavowed any intention to overrule *Renton*. First, Justice Kennedy stated that he was writing his concurring opinion because "the plurality's application of *Renton* might constitute a subtle expansion" of that decision, not to overrule it. 535 U.S. at 445. Later in his concurring opinion, Justice Kennedy stressed that "the central holding of *Renton* is sound. . . ." *Id.* at 448. Accordingly, there is no reason for this Court to reconsider *Renton's* holding that sites need only

potentially be available for lease or purchase, not that they actually be available for an adult business to lease or purchase.

Finally, Déjà Vu urges the Court to grant certiorari because the lower courts have purportedly had difficulty applying this Court's precedents specifying the type and amount of evidence that a local government must rely on to establish a connection between adult businesses and negative secondary effects. However, this Court has placed a slight burden on local governments, merely requiring them to rely on evidence that is reasonably believed to be relevant showing a correlation between adult businesses and negative secondary effects. The evidence that the County relied on was more than sufficient to meet the County's slight burden of showing the required correlation.

In enacting the amended Zoning Ordinance, the County's Board of Supervisors (the "Board") relied on: (1) 28 studies/reports from other jurisdictions that establish a correlation between negative secondary effects and adult businesses (Supplemental Excerpts of the Record ("SER"), Vol. 4, at 453 through Vol. 9, at 1718; 1752-1833); (2) more than 30 reported cases that discuss the correlation between adult businesses and negative secondary effects in other jurisdictions (SER, Vol. 3, at 16-17, 141-42; Vol. 9 at 1719-47); and (3) the public testimony of 15 witnesses who discussed negative secondary effects correlated with adult businesses. (SER, Vol. 9, at 1906-23.) In addition, the Board made findings in the preamble of the

amended Zoning Ordinance regarding the negative secondary effects associated with adult businesses. (SER, Vol. 3, at 15-17.)

At the district court, Déjà Vu's expert attempted to "rebut" the County's evidence, asserting that the studies the County relied on were "methodologically" flawed and that his own studies were proper "empirical" studies and showed that adult businesses are not associated with increased crime rates. The district court found that Déjà Vu had not successfully rebutted the County's evidence showing a correlation between adult businesses and crime, decreased property values, blight, excessive noise and traffic. The Ninth Circuit likewise held that Déjà Vu had not rebutted the County's evidence because its expert had not even addressed the evidence showing that adult businesses are correlated with excessive noise and traffic.

This Court has consistently placed a slight burden on local governments to produce evidence showing that adult businesses are correlated with specific secondary effects. *Alameda Books*, 535 U.S. at 442 (municipalities may rely upon any evidence that is "reasonably believed to be relevant") (internal quotation marks and citation omitted); *id.* at 451 (Kennedy, J., concurring) ("very little evidence is required"). There is no doubt that the evidence the County relied on satisfies the "very little evidence" standard and Déjà Vu's failure to address the evidence showing a correlation between adult businesses and excessive noise and traffic demonstrates that it did not rebut

the County's evidence. Therefore, this case is not a proper vehicle to address issues relating to the types and amount of evidence on which local governments may rely in establishing a connection between adult businesses and negative secondary effects.

STATEMENT OF THE CASE

In May 2002, Déjà Vu began operating an adult entertainment establishment in unincorporated San Diego County. (Appellants' Excerpts of Record ("AER") at 5, ¶ 17.)[2] Déjà Vu's business involves "the sale of sexually oriented novelties, magazines, newspapers and books" as well as "the sale and rental of prerecorded sexually explicit videos, CD's and DVD's. . . ." (*Id.* at 4, ¶ 13.) Déjà Vu is located in an area that is zoned for commercial use. (*Id.* at 4, ¶ 16.)

In June 2002, the County's Board passed Ordinance No. 9469, entitled "An Ordinance Amending the San Diego County Zoning Ordinance Relating to Adult Entertainment Establishments" (the "Amended Zoning Ordinance"). (SER, Vol. 3, at 15-32.)[3] The

[2] The Excerpts of the Record and Supplemental Excerpts of the Record were filed in the Ninth Circuit.

[3] The legislative record that was considered by the Board when it enacted the Amended Zoning Ordinance was part of the record on appeal and is contained in the Supplemental Excerpts of the Record.

Amended Zoning Ordinance became effective in July 2002. (*Id.* at 32.)

The Amended Zoning Ordinance requires adult entertainment establishments to be located within the following industrial zones: M50, M52, M54 or M58. (SER, Vol. 3, at 21-23, §§ 2503(a), 2523(a), 2543(a), 2583(a).) The Ordinance also prohibits adult entertainment establishments from being located "within 500 feet of any area zoned so as to permit the family residential use type as a primary use by right, or within 600 feet of any church, school, public playground or park, or within 1,000 feet of another such adult entertainment establishment." (*Id.*, Vol. 3, at 25, § 6930(b)(2).)

A. Proceedings Below

On October 11, 2002, Déjà Vu filed a lawsuit challenging the County's Amended Zoning Ordinance and provisions of the County's Regulatory Ordinance governing adult entertainment establishments. (SER, Vol. 1, at 1-23.) Another adult business in the unincorporated County, Fantasyland Video, Inc. ("Fantasyland") had filed a complaint against the County on September 24, 2002 also alleging that various non-zoning ordinance provisions regulating adult entertainment establishments violated the First Amendment. (*Id.*, Vol. 2, at 506-28.)

The County filed a motion for judgment on the pleadings as to Déjà Vu's complaint, which was granted in part and denied in part. (*Id.*, Vol. 2, at

531-39.) On April 16, 2004, Déjà Vu filed an amended complaint. (AER at 1-24.)

On August 5, 2004, the district court ordered the Fantasyland and Déjà Vu cases consolidated for pre-trial purposes. (SER, Vol. 1, at 46-53.) All of the parties subsequently moved for summary judgment. On June 14, 2005, the district court issued a ruling on the parties' cross-motions for summary judgment. (AER at 151-230.) In a published decision, the district court upheld the provisions of the County's Amended Zoning Ordinance against Déjà Vu's First Amendment challenge.[4] *Fantasyland Video,* 373 F. Supp. 2d 1094.[5]

On July 18, 2005, the trial court entered judgment in this case. (SER, Vol. 2, at 460.)

On August 10, 2005, Déjà Vu filed a notice of appeal. (*Id.* at 461-62.) On October 10, 2007, the Ninth Circuit issued a published opinion upholding the constitutionality of the County's Amended Zoning

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[4] The district court also ruled in the County's favor on Fantasyland's lawsuit.

[5] In the summary judgment ruling, the district court ordered Déjà Vu to show cause why its regulatory takings claim should not be dismissed based on the district court's conclusion that, for First Amendment purposes, the County's Amended Zoning Ordinance advanced a legitimate governmental interest. *Fantasyland Video*, 373 F. Supp. 2d at 1158. In a follow-up brief, Déjà Vu admitted that based on this Court's holding in *Lingle v. Chevron*, 544 U.S. 528 (2005), its regulatory takings claim should be dismissed. (SER, Vol. 2, at 454-56.) The district court subsequently dismissed Déjà Vu's claim. (*Id.* at 457-58.)

Ordinance. *Tollis, Inc. v. County of San Diego*, 505 F.3d 935 (9th Cir. 2007). On January 3, 2008, the Ninth Circuit denied Déjà Vu's Petition for Rehearing.

B. Proceedings In This Court

Déjà Vu filed a Petition for a Writ of Certiorari in this Court on April 2, 2008. The Petition was placed on the docket April 4, 2008.

ARGUMENT

I

DÉJÀ VU WAS NOT DENIED A REASONABLE OPPORTUNITY TO RELOCATE

Déjà Vu is the only adult business in the County that needs to relocate as a result of the County's Amended Zoning Ordinance. *Tollis*, 505 F.3d at 942. In the proceedings before the district court, the County identified 76 sites that are potentially available for Déjà Vu to relocate. *Fantasyland Video*, 373 F. Supp. 2d at 1132. Déjà Vu argued that numerous sites identified by the County were not available. *Id.* After a detailed review of the declarations submitted by the experts for both sides, the district court found that four of the sites identified by the County were not available. *Id.* at 1140. The district court also found that there were material issues of fact regarding whether another four sites identified by the

County were available. *Id.* Thus, the district court determined that Déjà Vu had not created a disputed issue of material fact that there are 68 sites available in the County for adult businesses to relocate. *Id.* at 1140-41. Pursuant to Ninth Circuit precedent, the district court determined that each of the 68 sites was "reasonably accessible to the general public," had "proper infrastructure" and was suitable for "some generic enterprise." *Fantasyland Video*, 373 F. Supp. 2d at 1133-35.[6] At the Ninth Circuit, "Déjà Vu did not

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[6] In *Renton*, the Court held that the local government does not have to present evidence that any particular parcel of land is actually available for lease or purchase by an adult business. *Renton*, 475 U.S. at 53-54 ("Respondents argue, however, that some of the land in question is already occupied by existing businesses, that 'practically none' of the undeveloped land is currently for sale or lease, and that in general there are no 'commercially viable' adult theatre sites within the 520 acres left open by the Renton ordinances. The Court of Appeals accepted these arguments, concluded that the 520 acres were not truly 'available' land, and therefore held that the Renton ordinance 'would result in a substantial restriction' on speech. We disagree with both the reasoning and the conclusion of the Court of Appeals. That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation.") (citations and footnote omitted). Déjà Vu argues that in his concurring opinion in *Alameda Books*, Justice Kennedy intended to overrule this portion of the *Renton* holding. According to Déjà Vu, "it seems apparent that what Justice Kennedy contemplated when imposing the 'how speech will fare' analysis was to require the examination of whether there were relocation sites that an adult business could actually purchase or lease." (Déjà Vu Brief, at 27.) No lower court has agreed with Déjà Vu's reading of Justice Kennedy's concurring opinion in *Alameda Books*. Indeed, it is apparent that Justice Kennedy did not

(Continued on following page)

contest any of the district court's individual determinations with respect to these remaining 68 parcels." *Tollis*, 505 F.3d at 941 (footnote omitted).

Given the potential availability of 68 sites for an adult business, no further analysis was necessary to ensure that Déjà Vu had a "reasonable opportunity to . . . operate" its business in the unincorporated County of San Diego. *Renton*, 475 U.S. at 54. Nonetheless, the district court also calculated the percentage of land that the County had set aside for adult businesses. The district court determined that 4.46% of the total industrially- and commercially-zoned acreage in the unincorporated County was available

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intend to overrule *Renton* on this point. Justice Kennedy stated that he was writing his concurring opinion in *Alameda Books* because "the plurality's application of *Renton* might constitute a subtle expansion" of that decision, not to overrule it. *Alameda Books*, 535 U.S. at 445. Later in his concurring opinion, Justice Kennedy stressed that "the central holding of *Renton* is sound. . . ." *Id.* at 448. Further, Déjà Vu's argument is inconsistent with its position that Justice Kennedy's concurring opinion in *Alameda Books* involved the "substantial governmental interest" prong of the *Renton* test, not the "alternative avenues of communication" prong of that test. Examination of the availability of alternative sites for lease or purchase falls under the "alternative avenues of communication" prong.

At the Ninth Circuit, Déjà Vu offered a different interpretation of Justice Kennedy's concurring opinion in *Alameda Books*, asserting that he intended to require local governments to "provide at least some evidence establishing a reasonable likelihood that such businesses can survive, economically, under the restrictions of the ordinance." (Déjà Vu's Ninth Circuit Reply Brief, at 5.) Once again, no lower court has agreed with Déjà Vu's interpretation of Justice Kennedy's concurring opinion.

to adult businesses and that this amount of available land was constitutionally sufficient. *Fantasyland Video*, 373 F. Supp. 2d at 1142. The Ninth Circuit agreed with the district court's analysis. *Tollis*, 505 F.3d at 942.

A. The Bright-Line Rules that Déjà Vu Advances Are Not Appropriate.

Déjà Vu urges the Court to grant certiorari in order two adopt two bright-line rules. First, Déjà Vu urges the Court to hold that in all circumstances a court must calculate the percentage of the total area of the municipality that is available for adult businesses. Next, Déjà Vu urges the Court to hold that the First Amendment requires a municipality to set aside, at a minimum, 5% of the total area of the municipality for adult businesses. The Court should reject Déjà Vu's invitation to create these bright-line rules. Such rules are not appropriate.

The present case is a perfect example of why such bright-line rules are not warranted. The County's Amended Zoning Ordinance only applies to the unincorporated areas in the County of San Diego, not to the 18 incorporated cities in the County. The unincorporated County is unique when compared to other municipalities. The unincorporated area of the County is huge – 2,286,059 acres (which translates into 3,572 square miles). (SER, Vol. 2, at 544, #22.) However, it is undisputed that much of that land – 1,352,122 acres – cannot be developed for any purpose (commercial, industrial or residential) because it is

owned by governmental entities or Indian tribes, and is being used for military bases (Camp Pendleton), parks (Anza-Borrego State Park, Cleveland National Forest, County parks), open space preserves, highways, airports, libraries, etc. (*Id.*, at 453, ¶ 2.) Further, 249,521 acres of the unincorporated area of the County are being used for agricultural purposes. (*Id.* at ¶ 3.) Agricultural lands are generally not suitable for commercial/industrial development.

Subtracting 1,601,643 acres from the total of 2,286,059 acres leaves 684,416 acres that theoretically could be developed for commercial/industrial purposes. However, of that total, approximately 550,000 acres consists of (1) uninhabited and remote desert areas, (2) steep mountainous or canyon slopes and (3) large residential parcels, with little or no nearby development. (*Id.* at ¶ 4.) These areas, for physical reasons (steep slopes) and practical reasons, such as lack of access and groundwater, cannot be developed. (*Id.*) Thus, this leaves less than 134,416 acres available for residential, commercial and industrial development.

Indeed, very little land in the unincorporated County is zoned for any industrial or commercial use. It is undisputed that 2,318.66 acres are zoned for industrial use and 2,764.86 acres are zoned for commercial use in the County. *Fantasyland Video*, 373 F. Supp. 2d at 1142. When these figures are added together, they show that only 5,083.52 acres are zoned for either industrial or commercial use in the unincorporated County and this is less than 0.22% of

the County's total acreage. Does this small percentage indicate that the County is discriminating against industrial and commercial businesses generally or that industrial and commercial businesses do not have a reasonable opportunity to open and operate in the unincorporated County?[7] Of course not. Rather, the small amount of land that is zoned for industrial and commercial businesses merely reflects the fact that much of the unincorporated County is uninhabitable, other areas are sparsely inhabited and that the population is concentrated near the incorporated cities. (SER, Vol. 2, at 452-53.) Similarly, the fact that a small percentage of the total area of the unincorporated County is available for adult businesses does not show that adult businesses are being discriminated against or that they do not have a reasonable opportunity to operate. The small percentage merely reflects how land is used in the County and how its population is distributed.

Requiring courts to calculate the percentage of the total area of the municipality that is available for adult businesses will lead to widely varying percentages depending upon the overall size of the municipality and how sparsely it is populated. This percentage will say nothing about whether an adult business would have a reasonable opportunity to locate in the municipality.

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[7] It is well recognized that commercial and industrial businesses are favored by local governments because of the tax revenues they generate.

Further, requiring a minimum of 5% of the total area of the municipality to be set aside for adult businesses is not necessary to ensure that an adult business will have a reasonable opportunity to open and operate. In this case, if Déjà Vu's bright-line rules were adopted, the County would have to set aside 114,303 acres (5% of 2,286,059 acres) for adult businesses. This amount of land would grossly exceed the amount needed for the only adult business that needs to relocate under the County's Amended Zoning Ordinance.

Indeed, the lower courts are in uniform agreement that the bright-line rules advocated by Déjà Vu are unnecessary and not helpful in determining whether an adult business has a reasonable opportunity to operate. *See North Avenue Novelties, Inc. v. City of Chicago*, 88 F.3d 441, 445 (7th Cir. 1996) ("The constitution does not mandate that any minimum percentage of land be made available for certain types of speech. What it does require is that zoning schemes that regulate the location of speech provide a 'reasonable opportunity' to disseminate the speech at issue. Requiring a 'reasonable opportunity' in each region can, and most likely does, result in vastly different acreage percentages. But those differences in no way imply that the regions with lower percentages are acting unconstitutionally."); *see also, Walnut Properties v. City of Whittier*, 861 F.2d 1102, 1108 (9th Cir. 1988) ("[U]nder the terms of the ordinance in question, an estimation of total available acreage is next to meaningless." Because of the ordinance's

dispersal or separation requirement, "[t]he number of sites available to adult businesses under the ordinance, therefore, depends not so much on the total amount of acreage available under the zoning scheme, but on how that acreage is dispersed throughout the City.").

B. The Industrial Zones Are Suitable Locations for an Adult Business.

Déjà Vu also makes much of the fact that under the County's Amended Zoning Ordinance, adult businesses are required to be located in industrial zones and that other commercial businesses are generally not allowed to locate in those zones. Déjà Vu implies that the industrial zones are not suitable for generic commercial businesses. However, that is clearly not the case. The district court found that each of the 68 sites located in the industrial zones was "reasonably accessible to the general public," had "proper infrastructure" and was suitable for "some generic enterprise." *Fantasyland Video,* 373 F. Supp. 2d at 1133-35. Déjà Vu did not challenge that determination on appeal. The fact that most commercial businesses are not legally allowed to operate in industrial zones says nothing about whether those zones are suitable for commercial businesses such as adult businesses. *Tollis*, 505 F.3d at 941-42 ("Whether or not an industrial zone *permits* generic commercial business within its borders rests on a legislative policy judgment. Asking whether an industrial zone *is suitable for* generic commercial

activity examines the physical characteristics and infrastructure of the land within the zone. . . . If an industrial site is reasonably accessible and has sufficient infrastructure to be 'available' . . . , it remains available even if its use for other commercial purposes may be restricted by the zoning law. . . . As Déjà Vu does not challenge any of the district court's holdings with respect to the suitability of any one of the 68 parcels for generic commercial use, its argument fails.") (citations omitted) (emphasis added).[8]

Indeed, the fact that other types of commercial businesses are generally not allowed to operate in industrial zones gives adult businesses a distinct advantage by reducing the competition for available parcels from commercial businesses.

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[8] Déjà Vu's assertion that the Ninth Circuit's decision on this point conflicts with other Ninth Circuit decisions is simply wrong. The Ninth Circuit has never decided a case where only adult businesses – not other types of commercial businesses – are allowed to locate in industrial zones. As the Ninth Circuit aptly recognized, an adult business's opportunity to relocate to an industrial zone is not hampered by the fact that other types of commercial businesses cannot locate in that zone.

C. The Ninth Circuit Did Not Conclude that There Is an Inadequate Number of Sites Available in the County, but that this Deficiency Can Be Remedied by Sites Available in Other Jurisdictions.

Déjà Vu asserts that the Ninth Circuit concluded that "even if there were insufficient industrial locations within San Diego County to which adult businesses could relocate, it could 'fairly be presumed' that there were other suitable areas for adult uses 'outside the territory governed by the ordinance in question.'" (Déjà Vu Brief at 13) (citation and emphases omitted). Déjà Vu is wrong. The district court found that there ***were sufficient relocation sites within the unincorporated County*** where Déjà Vu could relocate. *Fantasyland Video*, 373 F. Supp. 2d at 1140-41. That determination prevailed at the appellate level because Déjà Vu did not challenge the district court's finding. *Tollis*, 505 F.3d at 942 ("The district court determined that the remaining 68 sites, on which eight to 10 adult entertainment businesses could operate simultaneously, were sufficient to allow Déjà Vu – the only affected adult entertainment business in the county – an opportunity to relocate. Déjà Vu does not challenge this holding. . . .") (citation omitted) (emphasis added).

In explicit recognition of the fact that there are reasons unrelated to the suppression of free speech why the County has little land that is zoned for any type of commercial or industrial business, the Ninth Circuit made the following statement:

> It also must be borne in mind that the City of San Diego and the other incorporated municipalities in the county are not governed by the ordinance. The unincorporated portions of the county take up the substantial majority of the land area but only a small fraction of the population of the county as a whole. It may be fairly presumed that most of the commercial property in the county, including property suitable for adult businesses, is located within municipal boundaries and thus outside the territory governed by the ordinance in question. At least where we are dealing with "unincorprorated" areas, it is appropriate to recognize the likely availability of other locations within the same economic market in neighboring municipalities.

Id.

The Ninth Circuit did not conclude that the unincorporated County had an inadequate number of available sites for adult businesses, but this "deficiency" could be remedied by the likely availability of sites in nearby incorporated cities. Rather, the Ninth Circuit merely recognized in *dicta* what makes perfect sense – residents in an urban community made up of many different municipal jurisdictions (18 incorporated cities and the unincorporated County within the County of San Diego) do not visit commercial establishments located only within the municipal jurisdiction where they live. Many residents of the rural unincorporated County travel to incorporated cites to shop at big box retailers such as Home Depot

and Lowes. The incorporated cities tend to have more land zoned for commercial and industrial purposes because the population density in the incorporated cites is sufficient for commercial and industrial businesses to operate profitably. Therefore, it is logical to presume that incorporated cities will have additional locations available for adult businesses.

Further, the Ninth Circuit did not rely on the availability of sites outside of the County's jurisdiction to determine that the County has an adequate number of sites. The district court found that the County had an adequate number of sites within its own jurisdiction and Déjà Vu did not challenge this finding on appeal.

Because it is clear under any standard that Déjà Vu has a "reasonable opportunity" to relocate its business under the County's Amended Zoning Ordinance, the Petition should be denied.

II

THE COUNTY'S AMENDED ZONING ORDINANCE WAS ENACTED TO ADDRESS NEGATIVE SECONDARY EFFECTS, NOT TO SUPPRESS SPEECH

The Ninth Circuit determined that the County enacted the Amended Zoning Ordinance in order to reduce secondary effects associated with adult businesses, not to suppress speech. *Tollis*, 505 F.3d at 939. Citing the County's response to one of its interrogatory questions, Déjà Vu takes issue with that

determination, asserting that "the County candidly acknowledged that relegating adult uses to industrial districts would have the effect of reducing the patronage of those establishments." (Déjà Vu Brief, at 8.) However, the district court properly rejected Déjà Vu's interpretation of the County's interrogatory response. *Fantasyland Video*, 373 F. Supp. 2d at 1131-32 ("The response, when considered in its entirety, does not support the conclusion the County amended the ordinance to reduce the number of customers by making it more inconvenient to patronize adult entertainment businesses. Instead, the focus was on the patrons of the neighboring businesses. Furthermore, many industrial businesses are closed at night when adult entertainment businesses are busiest. The neighboring industrial businesses and their patrons would therefore not be as affected by secondary effects such as noise, traffic and crime, as are commercial businesses, which are often open at night. The reference in the response to reducing the number of potential crime victims therefore referred to the patrons of the neighboring businesses, rather than to adult entertainment patrons."). The Ninth Circuit did not disagree with the district court's determination.

Accordingly, the County enacted the Amended Zoning Ordinance in order to reduce negative secondary effects, not to suppress speech.

A. This Court Has Never Required a Municipality to List All Negative Secondary Effects the Ordinance Is Designed to Combat in the Preamble of the Ordinance.

Next, Déjà Vu asserts that ***every*** secondary effect that the legislative body believes is correlated with an adult business must appear in the preamble of the ordinance regulating adult businesses in order for the local government to rely on that secondary effect during litigation. Déjà Vu argues that the County's Amended Zoning Ordinance does not specifically state in the preamble that it was enacted to reduce noise and traffic associated with adult businesses; therefore Déjà Vu argues that its expert should be excused for failing to address the evidence relied on by the County's Board showing that adult businesses produce excessive amounts of noise and traffic particularly during late night hours. (Déjà Vu's Brief, at 12, n.15) ("Because these considerations were not even articulated as governmental interests of concern in the preambles to the Ordinance . . . the Plaintiffs' expert witness simply did not address these matters in his declaration.").[9]

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[9] The County's Amended Zoning Ordinance was also designed to combat other negative secondary effects of adult businesses such as crime, blight, and decreased property values. The district court found that Déjà Vu's expert had failed to "cast doubt" on the evidence relied on by the County to establish a correlation between these secondary effects and adult businesses. *Fantasyland Video*, 373 F. Supp. 2d at 1110, 1132. The Ninth Circuit did not reach the question whether Déjà Vu's

(Continued on following page)

This Court has never held, however, that each of the negative secondary effects correlated with adult businesses must be discussed in the preamble to the ordinance. Rather, this Court's "cases require only that municipalities rely upon evidence that is reasonably believed to be relevant to the secondary effects that they seek to address." *Alameda Books*, 535 U.S. at 442 (internal quotation marks and citations omitted). That evidence may consist of findings made in the preamble of the ordinance, but this is not the only evidence a municipality might believe is relevant. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 279 (2000) (plurality opinion).

B. There Was Ample Evidence in the Materials Relied on by the Board Showing a Connection Between Adult Businesses and Excessive Noise and Traffic.

In enacting its Amended Zoning Ordinance, the County relied on numerous studies from other jurisdictions, public testimony, and judicial decisions discussing the negative secondary effects correlated with adult businesses. Some of those sources discussed the

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expert had "cast doubt" on these other secondary effects. Instead, the Ninth Circuit held that Déjà Vu's expert had not addressed the secondary effects of noise and traffic and therefore had not cast doubt on those secondary effects. *Tollis*, 505 F.3d at 940. ("Déjà Vu's attempt to cast doubt on the County's conclusions fails as a matter of law because its expert . . . did not rebut the County's evidence with regard to noise and traffic.").

excessive noise and traffic produced by adult businesses, particularly during the late night hours. *Fantasyland Video*, 373 F. Supp. 2d at 1107-08. Those studies were in the legislative record and were relied on by the County's Board when it passed the Amended Zoning Ordinance. This Court has held that local governments may rely on such studies to meet their burden of showing that an ordinance is designed to advance a substantial government interest. *Renton*, 475 U.S. at 51.

Déjà Vu asserts that there is some disagreement among the lower courts regarding whether evidence showing a connection between adult businesses and specific secondary effects (here noise and traffic) can be relied upon during litigation if that evidence was not before the legislative body when it enacted the ordinance.[10] Even if such a disagreement existed, this case would not be an appropriate vehicle to review such a disagreement because the evidence demonstrating a connection between adult businesses and excessive noise and traffic was before the County's Board when it passed the ordinance. Déjà Vu contends in this Court that no such evidence was before

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[10] In *Alameda Books*, the Court concluded that municipalities may rely on new evidence if a defendant is able to "cast doubt" on the municipality's rationale or original evidence. *Alameda Books*, 535 U.S. at 439 ("If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.") (citation omitted).

the Board, but the district court found such evidence in the legislative record upon which the Board relied and Déjà Vu did not challenge this finding on appeal.[11] *Fantasyland Video*, 373 F. Supp. 2d at 1108 ("[T]he County relied on a voluminous legislative record, including numerous studies conducted by other municipalities, judicial opinions discussing similar secondary effects and public testimony ... [P]laintiffs' argument is targeted only toward evidentiary support addressing late night crime, and does

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[11] At the Ninth Circuit, Déjà Vu made various arguments why it believed that requiring adult businesses to be located in industrial zones would not reduce noise and traffic in residential and commercial zones, areas where more people live and where businesses that generally operate longer hours are located. For instance, Déjà Vu argued that the County somehow believed that the Amended Zoning Ordinance would reduce noise and traffic in commercial zones because "fewer customers visit industrial zones compared to commercial zones." (Déjà Vu's Ninth Circuit Opening Brief, at 31.) Déjà Vu attacked this straw man rationale vigorously. However, the County never asserted that a reduced number of customer visits to industrial zones was the reason why noise and traffic would be reduced in commercial areas. Rather, the County asserted that noise and traffic produced by adult businesses would be eliminated in commercial areas because adult businesses will be located in industrial areas, not commercial areas. The County explained this point in its interrogatory answers: "[R]equiring adult entertainment establishments to be located in industrial areas will reduce noise, traffic, and crime that effect commercial property owners and their patrons." (Appendix, at 240.) In any event, the County was only required to produce evidence that adult businesses are responsible for excessive noise and traffic, not that requiring adult businesses to be located in industrial zones will actually reduce noise and traffic in commercial areas.

not address the other targeted secondary effects such as late night noise, traffic and disorderly conduct. . . . [P]laintiffs' first argument fails as a matter of law to cast direct doubt on the County's evidence.").

Moreover, the district court was correct that there is evidence establishing a connection between adult businesses and excessive noise and traffic in the materials relied on by the County. For instance, the preamble to the Amended Zoning Ordinance indicates that the Board had considered the decision in *Mitchell v. Commission of Adult Entertainment*, 10 F.3d 123 (3rd Cir. 1993).[12] In that case, there was evidence that adult businesses "have become an absolute nuisance to the community in the form of additional traffic . . . ." *Id.* at 134. In addition, there was testimony that adult businesses cause "various problems . . . including noise, [and] traffic congestion. . . ." *Id.* at 136. In *Mitchell*, the court concluded

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[12] This Court has held that local governments may rely on the experiences of other jurisdictions as reported in judicial opinions to support an ordinance regulating adult businesses. *Renton*, 475 U.S. at 51 ("We hold that Renton was entitled to rely on the experiences of Seattle and other cities, and in particular on the 'detailed findings' summarized in the Washington Supreme Court's *Northend Cinema*[, *Inc. v. City of Seattle*, 585 P.2d 1153 (Wash. 1978)] opinion, in enacting its adult theater zoning ordinance."); *City of Erie*, 529 U.S. at 297 ("Erie could reasonably rely on the evidentiary foundation set forth in *Renton* and [*Young v.*] *American Mini Theatres*[, *Inc.*, 427 U.S. 50 (1976)] to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood.") (citation omitted) (plurality opinion).

that this evidence established a correlation between adult businesses and excessive noise and traffic. *Id.* at 137.

Further, many of the studies upon which the County's Board relied referred to excessive traffic and noise associated with adult businesses. *See* Final Report to the City of Garden Grove, SER, Vol. 5, at 653-54, 659 (real estate professionals and residents surveyed indicated that adult businesses cause increased noise and traffic); Staff Report Amendment to Zoning Regulations, January 9, 1978, SER, Vol. 5, at 711 ("For several years, the Police Department has received complaints of excessive noise. . . ." generated by adult businesses.); Adult Entertainment Study, City of New York, SER, Vol. 7, at 1163 (In public testimony, "[q]uality-of-life impacts, such as . . . noise . . . were often mentioned as impacts" of adult businesses.). Effects of Adult Entertainment Businesses on Residential Neighborhoods, SER, Vol. 8, at 1618 ("disturbing the peace" happened more in areas near adult businesses than areas away from adult businesses).

Because Déjà Vu did not attempt to rebut evidence that the County relied on showing a connection between adult businesses and excessive noise and traffic, this case is not an appropriate vehicle for the Court to examine whether a local government can rely on additional evidence produced during litigation showing a correlation between adult business and secondary effects.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ or Certiorari should be denied.

DATED: April 25, 2008.

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In The

Supreme Court of the United States

TOLLIS, INC., and 1560 N. MAGNOLIA AVE., LLC,

Petitioners,

v.

COUNTY OF SAN DIEGO,

Respondent.

On Petition For A Writ Of Certiorari
To The Ninth Circuit
United States Court Of Appeals

REPLY TO BRIEF IN OPPOSITION

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The County's opposition ("Opposition," or "Opp.") contains detailed and elaborate discussions of issues that are simply not raised by way of this petition. Moreover, in setting forth its points the County has mischaracterized a number of the arguments made by these Petitioners. Most importantly, however, is the fact that the County's Opposition simply fails to address these critical issues of the petition:

1) Who has the burden of satisfying Justice Kennedy's proportionality test as set forth in his concurring opinion in *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002)?

2) What burden must be met to satisfy that standard?

3) Was that test component ever analyzed, let alone resolved, in the proceedings below?

4) How can adult uses be constitutionally relegated to zoning districts that *preclude virtually all other commercial retail activities*?

5) Can general attributes of commercial activities (noise and traffic) be used to constitutionally preclude only "adult" businesses in the commercial areas of an unincorporated County?

Each of these matters will be discussed below.

I. THE COUNTY MISCHARACTERIZES THE PETITIONERS' ARGUMENTS REGARDING THE UNCONSTITUTIONALITY OF ORD. 9469.

While the County spends a great deal of time discussing its contention that Petitioners were not denied a "reasonable opportunity to relocate" under the "alternative avenues of communication standard" of *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (Opp., pp. 8-11), such an argument is simply not dispositive of this petition. What is relevant here is the question of how Justice Kennedy's proportionality test fits within the constitutional framework used to evaluate the validity of the challenged Ordinance, and whether relegating "adult" uses to industrial areas, *which preclude virtually all other commercial retail enterprises*, satisfies the constitutional standards under *Renton* of providing a "reasonable opportunity to open and operate" an adult use. 475 U.S. at 54.

Initially, the County argues that Petitioners believe that Justice Kennedy's concurring opinion in *Alameda Books* "overrule[s]" the holding in *Renton*. Opp., pp. 9-10, n.6. Petitioners raise no such argument. Rather, they assert that Justice Kennedy's proportionality test (examining "how speech will fare" when subjected to the challenged regulation) requires a constitutional analysis *separate and distinct* from the "alternative avenues of communication" test as set forth in *Renton*. The reasons that these tests are different are set forth in Section V, *infra*. It is for this

reason that the County is simply incorrect when it contends that once the "potential availability" of 68 sites for adult businesses was established, "no further analysis was necessary...." Opp., p. 10.

Petitioners' point is that neither the County nor the lower courts considered any evidence whatsoever as to the impact on the quantity and accessibility of speech (535 U.S. at 450 (Kennedy, J., concurring)) by requiring adult entertainment businesses to relocate to remote industrial zones. Nor did they analyze whether, in view of Justice Kennedy's opinion, the challenged Ordinance "has the purpose *and effect* of suppressing secondary effects" (*id.*), particularly when the Ninth Circuit rested its decision upon the purported governmental interests of traffic and noise; both of which are general attributes of *all* successful commercial endeavors.

These concerns are heightened by the fact that the County's interrogatory answers acknowledge – irrespective of its protestations to the contrary – that fewer citizens visit industrial zones (and would therefore bc less likely to patronize the Petitioners' establishment) and that common sense, under the particular factual circumstances here, substantiate that to be the case. *See*, Section III, *infra*.

The end result is the clear possibility of reduced availability and access to sexually oriented, but constitutionally protected, speech. The courts below were required to analyze this question, and the County was required to carry its burden in this

regard. Neither did, which demonstrates that further direction by this Court of these admittedly confusing standards is warranted.

II. PETITIONERS DO NOT ADVOCATE BRIGHT-LINE RULES.

Contrary to the arguments of the County, the Petitioners advance no "bright-line" rules in this area. Opp., p. 11. Rather, Petitioners demonstrated that different courts, facing the same factual circumstances, come to differing conclusions as to whether content-correlated adult zoning regulations pass First Amendment muster. Rather than seeking bright-line rules, Petitioners seek merely clarity and direction since the absence of a cohesive, uniformly applicable standard continues to produce confusing and conflicting opinions as the lower courts grapple with these issues and apply variants of the *Renton/Alameda Books* tests.

In addition, the County's arguments demonstrate the point made in the petition (pp. 23-26) that these amorphous standards engender result-oriented manipulation. The petition asserts that when the percentage of land available for adult uses becomes so infinitesimally small, government proponents of such legislation merely alter the denominator of the calculation in order to come to a more facially acceptable percentage. The County has done just that in the Opposition, when it deletes for consideration all of the unincorporated areas of the

County that "cannot be developed for any purpose...." Opp., pp. 11-15. Rather, the County contends that the denominator should comprise only of lands zoned for commercial and industrial use. Yet, adult uses are now *banned* in commercial districts, and "generic" commercial businesses are similarly prohibited in the industrial zones where adult uses are allowed.

The lack of direction from this Court permits governments (as was and is the case here) to simply "make up" any figures in an effort to justify the constitutionality of these speech-restrictive laws. The current chaotic state of affairs will continue until this Court clarifies the standards that are to be utilized by the lower courts.

III. IN THIS PARTICULAR CASE, THE INDUSTRIAL ZONES ARE NOT SUITABLE LOCATIONS FOR ADULT BUSINESSES.

In *Renton*, this Court makes clear that while adult businesses are not to be given preferential treatment in regard to zoning, they are to be treated on an equal footing with equivalent land users. 475 U.S. at 54 (adult businesses "must fend for themselves in the real estate market," and are not entitled to "obtain sites at bargain prices"). The problem here is that while industrial areas are not *per se* antithetical to fair adult use zoning, in these particular circumstances the County acknowledges that its manufacturing districts are inappropriate for the

establishment of retail businesses because such uses are *barred* in those areas.

As Petitioners previously pointed out, the County's intention in isolating their business to an industrial zone is to, admittedly, reduce the chances that people will frequent that establishment. App. 240, 242, 244, 246, 247, and 250. Simply put, industrial zones are not, here, suitable for commercial enterprises. On the other hand, the attributes of commercial zones make them viable locations for retail enterprises generally, including proximity to other commercial businesses frequented by potential patrons. If a business is forced into an industrial area with nothing but factories and warehouses that don't draw customers – as is the case here – it is fair to assume that there will be a sharp decline in the number of patrons who would frequent that facility. However, as Justice Kennedy held, this is improper. *Alameda Books*, 535 U.S. at 450.

IV. THE COUNTY MISCONSTRUES PETITIONERS' ARGUMENT REGARDING THE NINTH CIRCUIT'S CONCLUSIONS.

Contrary to the assertions in the Opposition (Opp., pp. 17-19), Petitioners do not attempt to argue that the Ninth Circuit held there were insufficient numbers of sites available in the unincorporated County. What Petitioners find troublesome is that the appellate court stated that ***even if*** there were insufficient sites available within the unincorporated

County, areas "outside the territory governed by the ordinance in question" could be considered in that evaluation. App. 14. As stated in the petition (pp. 35-37), this illustrates the slippery slope down which the secondary effects doctrine is traveling and sets a dangerous precedent worthy of this Court's review.

V. THE COUNTY FAILS TO ADDRESS JUSTICE KENNEDY'S PROPORTIONALITY TEST IN ITS ARGUMENTS.

While the County asserts that Ord. 9469 was enacted to address adverse secondary effects (Opp., pp. 19-20), it fails to respond to the key issue of whether, in the circumstances here, this Ordinance satisfies Justice Kennedy's proportionality test as set forth in his *Alameda Books* concurrence. Rather, the County argues, and the Court of Appeals seems to agree, that so long as the "alternative avenues of communication" standard in *Renton* is satisfied, the proportionality test is definitionally met as well. However, in analyzing Justice Kennedy's opinion, it is clear that the two standards are not the same.

Justice Kennedy posits an example to demonstrate his point. Because the ordinance at issue in *Alameda Books* prohibited "mixed" use adult businesses, "[o]ne business will either move elsewhere or close. The city's premise cannot be the latter." 535 U.S. at 451 (Kennedy, J., concurring). Consequently, the "premise" that the government must forward is that the adult businesses "will for the most part

disperse rather than shut down." *Id.* He then states that the question must then be asked as to whether there is significant evidence to support that contention. *Id.* Justice Kennedy then concludes that the proposition may assume that – in regard to the specific zoning ordinance there – *two percent* of the customers may decide not to travel to the separate businesses because they have been "discouraged by the inconvenience of the separation – a relatively small cost to speech." *Id.* at 452.

These comments demonstrate that the County's arguments cannot carry the day. First, Justice Kennedy's analysis *assumes* that the businesses will be able to successfully relocate, but that speech may nevertheless be impermissibly (and, thus, constitutionally) affected simply as a result of the mandated "inconvenience" to the patrons. Here, there is nothing to presume that adult uses will not be adversely affected and, in fact, the statements of the district court belie such a conclusion. As quoted by the County on page 20 of its Opposition, the district court found that "many industrial businesses are closed at night when adult entertainment businesses are busiest." Consequently, in order to satisfy the proportionality test proposition in *this case*, one would have to assume that patrons would not be dissuaded to visit a *virtually deserted* industrial area of the unincorporated County *at night*, and that the dissemination of speech and expression would not then be impacted. Such a conclusion would, even if made, defy credulity.

Second, neither the County nor the lower courts made any such proposition. Simply put, there was no analysis made below (and the County certainly never presented any evidence in support of its burden to demonstrate) as to how "speech would fare" in light of the enforcement of Ord. 9469.

Third, even if such a proposition would have been made, the Petitioners are still entitled to challenge the same at trial. *Alameda Books*, 535 U.S. at 453 (Kennedy, J., concurring) ("If these assumptions can be proved unsound at trial, then the ordinance might not withstand intermediate scrutiny"). Here, these Petitioners were afforded no such opportunity and, to the contrary, summary judgment was entered *against* them.

These circumstances well demonstrate that further direction from this Court is warranted.

VI. THIS COURT NEEDS TO CLARIFY WHEN, AND EVEN WHETHER, A MUNICIPALITY IS REQUIRED TO IDENTIFY THE PURPORTED NEGATIVE SECONDARY EFFECTS A REGULATION IS SUPPOSEDLY AIMED AT REDUCING.

Petitioners demonstrated that lower courts cannot agree upon when, and even whether, a municipality needs to rely on secondary effects information when enacting speech-restrictive laws. Petition, pp. 19-22. The County does not attempt to reconcile these irreconcilable decisions, and if First Amendment

scrutiny is to have any teeth whatsoever in this area of jurisprudence, there must be further clarification on this point in order to ensure that a challenger has a legitimate opportunity to "cast direct doubt" upon a municipality's rationale for these types of regulations. *Alameda Books*, 535 U.S. at 438-439.

If the government can create "new" governmental interests at any time in the judicial process, the ability to mount such a challenge becomes a nullity as the target is ever-moving. For example, here (and as will be discussed in the section immediately below), the preambles to the County's Ordinance (App. 170) did not even hint at the obscure effects of "noise and traffic" as being purported grounds to enact Ord. 9469.

VII. SAN DIEGO COUNTY CANNOT JUSTIFY THE ENACTMENT OF ITS ADULT BUSINESS ORDINANCE BASED UPON THE CONCERNS OF "NOISE AND TRAFFIC."

Faced with the arguments that the Petitioners have raised, the Respondent has combed through the legislative record in regard to the enactment of Ord. 9469 in search of any morsel of documentation regarding the concerns of noise and traffic. The references that it has found are so fleeting and unremarkable that: a) neither noise nor traffic are listed as issues of concern in the preambles which discuss the underlying concerns that the County felt justified the enactment of the Ordinance; b) they are

not cited by the district court as a basis for its ruling; and c) they are not referenced in the appellate court ruling either.

Nevertheless, the County cites to *Mitchell v. Commission of Adult Entertainment*, 10 F.3d 123 (3rd Cir. 1993), which, admittedly, is listed as a supposed "relied upon" judicial decision in the ordinance preambles. Yet, reliance upon *Mitchell* demonstrates the folly of the County's argument here and bolsters the concerns raised by the Petitioners that the ill-defined secondary effects doctrine provides the proverbial slippery slope down which this area of jurisprudence is heading in order to permit the pretextual suppression of disfavored expression.

In *Mitchell*, the Court noted that Senator McBride, the sponsor of the legislation, noted that one of the concerns observed in re-writing adult legislation approximately ten years earlier had been the circumstance of where adult businesses "abut residential communities," and that such establishments had become "an absolute nuisance to the community in the form of additional traffic...." *Id.* at 134. This, it was argued, justified the enactment of the hours of operation restriction that was at issue in *Mitchell* "so that the neighborhoods can get some peace and quiet at least part of the day." *Id.* at 134-135.[1]

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[1] The other references to the legislative record cited by Respondent similarly concern the circumstance of an adult use

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First, the zoning provisions that the Petitioners had to comply with at the time they first established their business *already* required adult uses to be located away from sensitive uses, including residential areas. *See,* Petition, p. 3, n.1. Consequently, Ord. 9469 cannot be based upon the necessity of reducing noise in residential areas since adult uses were *already* segregated from those districts.

Second, whereas *Mitchell* uses the concerns of noise and traffic to justify the enactment of an hours-of-operation restriction of adult uses, the Petitioners are also subject to a similar type of regulation which was enacted upon these same purported concerns of noise and traffic. *See*, Petition, p. 8, n.10.

Third, the County does not even attempt to respond to the point that all commercial uses create noise and traffic to some extent, particularly if they are successful businesses, and that there was nothing in the record, and no logical basis to believe, that substituting a non-adult retail bookstore establishment in place and instead of the Petitioners' facility

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abutting residential property. *See, e.g.*, S.E.R. 658-659 (survey of real estate professionals asked their subjective opinion as to the impact that an adult entertainment business "located in their neighborhood" would have); S.E.R. 711 (police department had received complaints of excessive noise in the "adjoining neighborhood"); S.E.R. 1162-1163 (summary of New York report discussing "adult establishments in various neighborhoods"); and S.E.R. 1613 (study analyzing "neighborhoods containing sex-related businesses").

would in any way reduce noise and traffic in a commercial zoning district.[2]

Fourth, *Mitchell* also mentions, just as obliquely, the issue of "parking problems." *Id.* at 136. Yet, the County never raised this "concern" as a justification for the enactment of the Ordinance, even though this problem was articulated in *Mitchell*. So, how were the Petitioners to know which of the various concerns fleetingly mentioned in this legislative record – regardless of how briefly – it would be required to challenge if those matters were not articulated as specific governmental concerns of *San Diego County*?

Finally, as it asserted in its interrogatory answers, the County reiterates that it "was only required to produce evidence that adult businesses are responsible for excessive noise and traffic, not that requiring adult businesses to be located in industrial zones will actually reduce noise and traffic in commercial areas." Opp., p. 24 n.11. But such a contention flies in the face of both the majority precedent of this Court as well as Justice Kennedy's concurring opinion in *Alameda Books*.

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[2] While the County contends that the Petitioners did not challenge the finding concerning "noise and traffic" on appeal (Opp., p. 24), they devoted six and one-half pages in their Ninth Circuit appeal brief to arguing, and demonstrating, that there was an absence of a significant governmental interest in the enactment of the challenged Ordinance. Appellants' Opening Brief, pp. 38-44.

In *Renton*, this Court stated that adult zoning laws would be declared constitutional if they were "designed to *serve* a substantial government interest...." 475 U.S. at 47. This language certainly indicates that a speech-restrictive law must actually, at least to some extent, "work." *See also United States v. O'Brien*, 391 U.S. 367, 377 (1968) (under intermediate scrutiny, a speech-restrictive law will be constitutional if, among other things, it "*furthers* an important or substantial government interest") (emphasis added).

Justice Kennedy's concurring opinion in *Alameda Books* is no different. "[A] city ***must advance some basis to show*** that its regulation has the ***purpose and effect*** of ***suppressing secondary effects***." *Alameda*, at 449-450 (Kennedy, J., concurring) (emphasis added). By the County's own admission, it failed to do this and more particularly failed to demonstrate that relegating adult uses solely to the industrial areas of the unincorporated county would advance the governmental interests of reducing noise and traffic in the commercial areas of the County.

CONCLUSION

For the reasons set forth herein and in their Petition for a Writ of Certiorari, Petitioners respectfully request that this Honorable Court grant the petition.

Dated: May 13, 2008

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